IN RE ANGELINA S. ET AL.*
(AC 46551)

Alvord, Elgo and Prescott, Js.

Syllabus

The respondent father appealed to this court from the judgments of the trial court terminating his parental rights with respect to his minor children. The petitioner, the Commissioner of Children and Families, filed petitions to terminate the father's parental rights after the children had been adjudicated neglected and committed to the petitioner's custody. After a trial, the court found by clear and convincing evidence that, although the father had complied with some of his court-ordered specific steps, he persistently refused to cooperate with the services recommended by the Department of Children and Families regarding substance abuse and mental health, including failing to participate in a

* 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.

psychiatric evaluation. The court found that the department had become concerned about the father's substance use after several instances had occurred in which the father appeared impaired. The department referred the father to H Co. for a mental health evaluation and medication management, but the father never engaged with that provider. The father advised the department that he had been treating with M, an advanced practice registered nurse, who managed his medications, and that he did not want to change treatment providers, expressing concern that H Co. would not prescribe the benzodiazepines that M prescribed for him. *Held* that the trial court properly determined that the department made reasonable efforts to reunify the respondent father with his children, he was unable or unwilling to benefit from reunification services, and he failed to achieve such a degree of personal rehabilitation within the meaning of the applicable statute (§ 17a-112) as would encourage the belief that within a reasonable period of time, considering the ages and needs of the children, he could assume a responsible position in the children's lives: contrary to the father's claim, the department did not require him to disengage from M but, rather, recommended, consistent with the testimony of C, a psychologist, that he engage in therapy, which M did not provide, and receive a second opinion in the form of a psychiatric reevaluation with another provider to determine if there were additional or different medications that he could be taking to treat his symptoms; moreover, the concern underlying the department's recommendation was, as the trial court found, that the father had failed to acknowledge and address his issues of substance use and mental health, which were his primary barriers to reunification, the father having refused to cooperate with department recommended services, including not only the psychiatric reevaluation but also therapy to learn coping skills to address anxiety and distress tolerance, rather than relying solely on medication, and the father's failure to comply with these crucial elements of his specific steps were particularly concerning given the numerous reports of the father presenting as impaired; furthermore, the trial court found that the father was not credible with respect to many aspects of his testimony, particularly his claimed lack of knowledge of the department's recommendations regarding therapy, his contention that he, in fact, had attended therapy, and his explanations surrounding his positive test results for fentanyl, and, accordingly, having rejected the father's claim that the department required him to disengage from his medical provider and having reviewed the record before it, this court concluded that the cumulative effect of the evidence was sufficient to justify the trial court's conclusions.

Argued November 6—officially released December 18, 2023**

** December 18, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petitions to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Chavey*, *J.*; judgments terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed*.

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

Joshua Perry, solicitor general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Ingrid Swanson, for the minor children.

Opinion

ALVORD, J. The respondent father, Troy S., appeals from the judgments of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his minor children, A and M, pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[1] On appeal, the respondent claims that the trial court improperly determined that the Department of Children and Families (department) made reasonable efforts to reunify him with his children, he was unable or unwilling to benefit from reunification services, and he failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable period of time, considering the ages and needs of the children, he could

[1] A guardian ad litem was appointed for the respondent mother, Lindsay B., who was found to be incompetent. The court also terminated her parental rights. Because Lindsay B. is not participating in this appeal, we refer in this opinion to the respondent father as the respondent.

assume a responsible position in the children's lives.[2] We affirm the judgments of the trial court.

The following facts and procedural history are relevant to our consideration of the respondent's appeal. The department has been involved with A and M throughout their entire lives. The department received a report in March, 2019, when A was born, that A's mother, Lindsay B., was taking methadone and benzodiazepines, leading the hospital to treat the newborn A under the neonatal abstinence syndrome protocol. Upon A's discharge from the hospital to the home of Lindsay B. and the respondent, the respondent was identified as A's primary caretaker because he was compliant at that time with methadone treatment at the APT Foundation (APT). On April 3, 2019, the petitioner filed a neglect petition as to A. On July 30, 2019, the court adjudicated A neglected and ordered a three month period of protective supervision. A motion to extend the period of protective supervision for six additional months was granted on October 22, 2019.[3] The court again extended the period of protective supervision for an additional six months, which would have elapsed on September 18, 2020.

M was born in the kitchen of Lindsay B.'s home in August, 2020. Lindsay B. had received no prenatal care during her pregnancy with M. At the hospital where M and Lindsay B. were transported after M's birth, both the respondent and Lindsay B. were "observed to be passed out." Although Lindsay B. was "slurring her speech, drooling, and falling asleep mid-sentence," the respondent advocated for her to receive benzodiazepines. At one point, hospital staff were unable to wake

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

[3] The period of protective supervision was extended with the condition that Lindsay B. have no unsupervised contact with A.

the respondent, who was sleeping while holding newborn M, even by touching his arm. M showed symptoms of neonatal abstinence syndrome and remained in the hospital for two weeks after her birth, during which time the respondent did not return to visit. On August 28, 2020, the petitioner sought orders of temporary custody as to A and M, vested in the children's paternal great-aunt and great-uncle, and filed a neglect petition as to M. The court sustained the orders of temporary custody on September 2, 2020.

On April 14, 2021, the court adjudicated M neglected and committed her to the custody of the petitioner. The court also modified the prior disposition with respect to A and committed her to the custody of the petitioner. The court ordered specific steps as to the respondent.

On November 29, 2021, the petitioner filed petitions to terminate the parental rights of the respondent and Lindsay B. with respect to A and M. A trial on the termination of parental rights was held over three dates beginning in January, 2023, before the court, *Chavey*, *J.* The court heard the testimony of Jessica Biren Caverly, who was qualified as an expert in forensic psychology; Melanie Vitelli, clinical coordinator from 'r kids Family Center (R Kids); Courtney White, a department social worker; Artemisia Cardona, a department investigative social worker; Loren Pappagoda, a department ongoing services social worker; and the respondent.[4] The court also admitted documentary evidence. Only one exhibit was admitted over the objection of the respondent's counsel.

On March 29, 2023, the court issued its memorandum of decision, in which it terminated the parental rights of the respondent and Lindsay B. The court found by clear and convincing evidence that the department had

[4] The court also heard the testimony of Ignacio Cerdena, an expert in psychiatry, who conducted the competency evaluation of Lindsay B.

made reasonable efforts to reunify A and M with the respondent and that the respondent was unable or unwilling to benefit from the department's efforts. The court found that, although the respondent had complied with some of his specific steps, "he persistently refused to cooperate with [the department's] recommended services regarding substance use and mental health, instead insisting either that he did not need or want the services to which he was referred or that he had complied when in fact he had not."

The court found that the respondent had resumed methadone maintenance following a back injury and knee surgery, as an alternative to other forms of pain management. The respondent testified that he had " 'bottle privileges' " with APT and picks up thirteen bottles of methadone every other week. The respondent explained that APT requires that he attend one group session per month and one meeting per month. Following M's birth, the department became concerned about the respondent's substance use. Specifically, there were instances when the respondent appeared impaired, and he belatedly disclosed that he was receiving mental health medication management from Michelle Muzyka, an advanced practice registered nurse, who also had been treating Lindsay B.[5] The respondent testified that, in March, 2019, he began treating with Muzyka, whom he saw every two months or sometimes every three months for panic attacks and anxiety. Muzyka prescribed the respondent alprazolam, which is a benzodi-

[5] The trial court found that, following a medication management intake assessment with Lindsay B. on February 1, 2020, Muzyka "immediately prescribed benzodiazepines for [her]. [The department] made numerous requests of [Lindsay B.] to sign a release that would permit [the department] to communicate with . . . Muzyka. Eventually, [Lindsay B.] signed a release in October, 2020, but . . . Muzyka repeatedly failed to respond to [the department's] contacts, which included letters, faxes, phone calls, and emails."

azepine, and gabapentin.[6] She reported[7] that the respondent already had been prescribed his medication at the time he began seeing her. Muzyka stated that she was treating the respondent for generalized anxiety disorder and attention deficit hyperactivity disorder. She further reported that she did not provide therapy to the respondent.

The department consulted with its Regional Resource Group, which recommended that the respondent receive treatment at Hill Health Center, and the department, on multiple occasions beginning in August, 2020, referred the respondent there for a mental health evaluation and medication management.[8] The respondent testified that, after he told Hill Health Center that he needed only an evaluation but not treatment because he already had a provider, he was told the center did not do evaluations if the patient would not be seeking treatment there as well. The respondent never engaged with Hill Health Center, and he advised the department that he did not want to change treatment providers. He "expressed concern that Hill Health Center would not prescribe the benzodiazepines he was getting through . . . Muzyka, which he said he needed for his anxiety."

The court noted the recommendations of Wendy Levy, a psychologist who performed a court-ordered evaluation of the respondent in the spring of 2021. Levy's recommendations directed the respondent to "[e]ngage in therapy to learn coping skills to address

[6] The court noted that the APT "records also reveal [that] Muzyka was prescribing [the respondent] dextroamp, an amphetamine in 20 [milligram] tablets, with sixty tablets for thirty days."

[7] Although Muzyka failed to respond to the department's attempts to contact her, she did respond to Caverly, who prepared the court-ordered psychological evaluation.

[8] The department also advised the respondent that "it was concerned he was treating with the same provider . . . Muzyka, [who] was prescribing benzodiazepines to [Lindsay B.] following her prior abuse of and illicit use of benzodiazepines."

anxiety and distress tolerance rather than rely solely on anxiety medication, [and] [p]sychiatric reevaluation (Psychologist recommended the APT Foundation, however they do not offer long-term mental health services. Clinicians are only available for acute concerns).'' Levy's recommendations were incorporated into specific steps issued on June 1, 2021, of which the court took judicial notice. The court found that the respondent did not comply with ''crucial elements'' of his specific steps, including failing to participate in a psychiatric evaluation.

The court rejected as not credible portions of the respondent's testimony. Specifically, the court did not credit his testimony that he had no knowledge of Levy's recommendations and that he had done everything the department had asked of him.[9]

The court found that the department also offered the respondent visitation and case management services. ''[The] respondent . . . had visits with the children at their relative placement until January, 2021, when his behavior led the relatives with whom the children were

[9] The court also rejected as not credible the respondent's testimony that he had engaged in therapy with someone named ''Dr. Sullivan'' in 2022. The court noted discrepancies in the respondent's description of the frequency of the therapy and that the respondent testified that he did not know what kind of doctor Sullivan was or where he was located. His testimony also suggested that he had received the referral to Sullivan in 2018 at the latest but that he began treating with Sullivan in 2022. Last, the court noted that the respondent never told the department that he was engaging in therapy.

The court continued: ''In any event, even if the respondent . . . did engage in mental health therapy a few times in 2022 with a Dr. Sullivan, he admitted to ending that therapy by mid-2022. He testified he had then intended to start therapy with a partner of . . . Muzyka but had not done so because he had been 'so busy' and had not 'had a chance' in the 'hectic' six months prior to his trial testimony in January, 2023. Such limited participation in mental health therapy falls far short of the goal in the specific steps, based on Dr. Levy's recommendation, that the respondent . . . '[e]ngage in therapy to learn coping skills to address anxiety and distress tolerance rather than rely solely on anxiety medication.' ''

placed to discontinue the visits. Thereafter, the respondent . . . had weekly video visits, followed by [department] supervised visits at [the department's] offices. [The department] then referred both the respondent [and Lindsay B.] to R Kids for the Therapeutic Family Time program, which was a twelve week visitation and parenting program, of which the respondent . . . attended nine sessions. One of the sessions he missed was the closing session, which R Kids requested he attend with his lawyer and mental health provider 'so we could discuss everything together.' Contrary to R Kids' records, the respondent . . . testified at trial that he was never told about the closing meeting. This is yet another example of the [respondent's] lack of credibility, as the evidence is clear and convincing that R Kids did communicate with him about the closing meeting." (Footnote omitted.) Although the respondent "generally did well" in his visits, R Kids did not recommend reunification because he was not compliant with his court-ordered specific steps.[10]

In conclusion, the court found that the department had "made consistent efforts throughout this case to engage the respondent . . . in appropriate services to address his substance use and mental health. Even after Dr. Levy recommended reunification in 2021, however, the respondent . . . refused to comply with any of her recommendations that would have risked changing his medications." The court found that the respondent was unable or unwilling to benefit from the department's efforts.

The court also found that the respondent's anxiety condition "was far from well controlled . . . ." In 2022,

[10] The department referred the respondent to the Quality Parenting Center for visitation and parenting coaching in November, 2021. The respondent required little redirection from the parenting coach and he continued in that program through December, 2022. After the Quality Parenting Center program, the respondent had supervised two hour visits in his home.

the respondent tested positive for fentanyl but maintained that he had not knowingly used it, which the court found not credible in part because he gave conflicting accounts as to how he might have ingested it inadvertently.[11] Specifically, the court found not credible the respondent's contention, following positive fentanyl tests in April, June, and July, 2022, that the fentanyl could have remained in his system for ninety days, whereas guidelines contained in the APT records indicated that fentanyl generally is detectable for only up to three days. The court also found that the respondent misrepresented APT's response to the positive tests for fentanyl and that the respondent misrepresented to APT his role in caring for A and M. Specifically, he reported to APT on more than one occasion that he had his children in his care part-time, when the children in fact were living full-time with their foster parents, the children's paternal great-aunt and great-uncle. The court found that it appeared the respondent "was seeking to use his (unfounded) statements about his role as a caregiver to his children in his quest to avoid or minimize a step-down of his bottle privileges."

The court also referenced evidence that the respondent was " 'agitated' " and " 'argumentative' " when APT discussed its concerns regarding the positive test results for fentanyl, and he told APT that, if he did not receive his take-home bottles of methadone, he would " 'just buy it off the street' . . . ." The respondent presented at that time with " 'heavy' " eyes, " 'as if he was

[11] "[H]e told APT that he had not knowingly used fentanyl, but had used marijuana in a vaping device that must have been laced with fentanyl. He said he used marijuana to address stress. Specifically, the respondent . . . told APT in July, 2022, he was using marijuana twice a day, every morning and every night, to help alleviate stress and back pain. In this context, the [respondent's] insistent refusal to seek—or continue—mental health therapy or to engage in a psychiatric evaluation played a significant role in his continued mental health challenges."

under the influence of benzodiazepines which is prescribed.' " When APT discussed his third positive test for fentanyl with him, the respondent again was agitated and used racial slurs. The court also referenced APT records that indicated in June and July, 2022, he was slurring his words and appeared to be under the influence of substances.

The court found that the respondent had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and needs of the children, he could assume a responsible position in their lives. Specifically, it found that the respondent had "failed to acknowledge and address the persistent issues of substance use and mental health, which are his primary barriers to reunification, and instead has denied that he has any problems that are not adequately addressed through his treatment with . . . Muzyka and [APT's] methadone maintenance program. He has nonetheless resorted to self-medicating with marijuana, allegedly to address stress and back pain, while denying or ignoring the significant risks of fentanyl, whether he ingested it deliberately or inadvertently. The respondent . . . was repeatedly observed by [APT] to be under the influence in mid-2022, and he became angry and argumentative when APT discussed the step-down with him following his positive fentanyl tests.

"The court finds that the respondent . . . consistently chose to refuse [the department's] recommendations rather than risk having to change his current medication regimen. At trial, he conceded that, despite [the department's] repeated requests and encouragements—which were incorporated into the June 1, 2021 specific steps based on Dr. Levy's recommendations—for him to participate in an evaluation and treatment at Hill Health Center, he refused to do so. While he

asserted at trial that, without ever telling [the department], he did engage in mental health therapy in 2022, the court does not credit this testimony . . . . In any event, however, any therapy in which the respondent . . . claims to have engaged was short-lived and did not improve his mental health or reduce his dependence on anxiety medication.

"The court thus finds that the respondent . . . is no more suitable as a sober, competent caregiver for his young children now than he was in August, 2020. He has failed and refused to comply with the court-ordered specific steps that could have helped him gain better control of his substance use and mental health, reduce his reliance on antianxiety medication, ensure his medication regimen is appropriate, and ultimately serve as a sober and stable parent to his children. He has repeatedly misrepresented his actions, his knowledge of the specific steps, and other matters described above in his effort to appear more compliant than he in fact was. The respondent . . . has failed to rehabilitate by refusing to take [the department's] recommendations seriously or to make any meaningful progress toward the goals in the court-ordered specific steps. . . .

"Because of the ample time the respondent . . . has had to rehabilitate, and because he is not trending toward successful rehabilitation but instead has continued to resist [the department's] efforts and been noncompliant with the specific steps that the court ordered nearly two years ago, no additional time for rehabilitation is warranted."

In the dispositional phase of the proceedings, the court made findings as to each of the criteria set forth in § 17a-112 (k) and concluded that the termination of the respondent's parental rights was in the children's best interests. Accordingly, the court rendered judgments terminating the respondent's parental rights and

appointing the petitioner as the children's statutory parent. This appeal followed.

We first set forth our standard of review. "[T]he court's determination as to whether the department made reasonable efforts toward reunification is a legal conclusion drawn from the court's subordinate factual findings. Therefore, we apply a clearly erroneous standard of review as to the court's underlying factual findings, and we review the court's legal determinations of reasonable efforts and of failure to rehabilitate for sufficient evidence." (Internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 589–90, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091 (2020), cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020); see also *In re Emily S.*, 210 Conn. App. 581, 584, 270 A.3d 797 ("[s]imilarly, in reviewing a trial court's determination that a parent is unable to benefit from reunification services, we review the trial court's ultimate determination . . . for evidentiary sufficiency, and review the subordinate factual findings for clear error" (internal quotation marks omitted)), cert. denied, 342 Conn. 911, 271 A.3d 1039 (2022). In applying the evidentiary sufficiency standard of review, "[w]e look to see whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court."[12] (Internal

[12] Although the respondent claims that evidentiary sufficiency is an improper standard of review in child protection cases, he also concedes that, as an intermediary appellate court, we are bound by our Supreme Court's decision in *In re Shane M.*, 318 Conn. 569, 588, 122 A.3d 1247 (2015), in which the court held that "the appropriate standard of review is one of evidentiary sufficiency . . . ."

quotation marks omitted.) *In re Judah B.*, 221 Conn. App. 387, 397, 300 A.3d 1253 (2023).

As the respondent recognizes in his principal brief, his three claims[13] all are predicated on the same issue.[14] Specifically, the respondent claims that the department's efforts were not reasonable because the department "required [him] to engage in a service that would have stripped him from his medical providers, and because the department offered no medical basis for requiring the shift . . . ." As to the court's alternative finding, the respondent contends "that it was error for the trial court to determine that he was unable or unwilling to benefit from services where the basis of that decision is his unwillingness to participate in an unreasonable service." Finally, as to the adjudicatory ground, the respondent argues that he "cannot be deemed to have failed to rehabilitate based upon his unwillingness to participate in services that the department failed to prove were necessary or warranted." Each of the respondent's claims is premised on his contention that the department was requiring him to "disengage from his current medical provider" and "switch providers," a premise which we determine is not supported by the record.

Our careful review of the record reveals that the department did not require the respondent to disengage from Muzyka but, rather, recommended that the respondent engage in therapy and receive a "second opinion" in the form of a psychiatric reevaluation. Specifically, Caverly testified that her recommendation, which was

[13] The respondent in this appeal does not challenge the court's finding that the termination of his parental rights was in the best interests of the children.

[14] Specifically, the respondent states in his brief that "[t]he argument in both prongs of the reasonable efforts claim is rooted in the same fundamental concern," and that, "[i]n many ways, [the] claim [with respect to the trial court's determination that he failed to rehabilitate] is also linked with the arguments concerning reasonable efforts stated above."

also made by Levy, was for the respondent "to complete a psychiatric evaluation with a provider other than his current provider to determine if there were additional or different medications that he could be taking to treat his symptoms instead of relying on the medication that he was taking." Caverly further testified that she would "like a second opinion about what medications he should be on and what the dosages should be" and that she would like "someone else to evaluate those medications to see if they're the appropriate and best medications for him."[15] Accordingly, the respondent's

[15] The respondent cites the following colloquy between the respondent's counsel and Pappagoda:

"Q. Did you ever seek a court order to have Ms. Muzyka respond to you?

"A. No.

"Q. Okay. So, now, one of the reasons that you state [the respondent] is not in compliance with his substance abuse treatment or you said he tested positive for benzos at the APT Foundation?

"A. He consistently tests positive for benzodiazepines at the APT Foundation, however, he has an active prescription for those medications.

"Q. So, he should test positive for them?

"A. Right.

"Q. Okay. And, throughout the life of this case, he's had a legally valid prescription for them, hasn't he?

"A. Yes.

"Q. Okay. And, as of today, or as of the last time you were able to get contact as far as the APT Foundation is concerned, he's in compliance with them?

"A. Yes.

"Q. Okay. Now, you wanted to send him to the Hill Health Center for prescription or medication evaluation. Is that true?

"A. For mental health, which would include therapy and medication management.

"Q. And you wanted them to have him put him on alternative treatment?

"A. That was the Regional Resource Group recommendation, yes.

"Q. So, the Regional Resource Group was insisting he change his legal prescription provider he's been seeing for quite some time?

"A. Yes.

"Q. That was the—that they insisted on it?

"A. Yes. That was the recommendation, yes."

However, the colloquy continues with the following:

"Q. And they sent him to the Hill Health Center with the idea that that's the result they're gonna get?

"A. With what result that they're gonna get?

interrelated claims fail because they are based on a premise that is not supported by the record.

Moreover, the concern underlying the department's recommendation was, as the trial court expressly found, that the respondent had "failed to acknowledge and address the persistent issues of substance use and mental health, which are his primary barriers to reunification . . . ." Our appellate courts have stated that a "failure to acknowledge the underlying personal issues that form the basis for the department's concerns indicates a failure to achieve a sufficient degree of personal rehabilitation." (Internal quotation marks omitted.) *In re Nevaeh G.-M.*, 217 Conn. App. 854, 880, 290 A.3d 867, cert. denied, 346 Conn. 925, 295 A.3d 418 (2023). As detailed by the trial court, the respondent refused to cooperate with department recommended services, which included not only the psychiatric reevaluation but also therapy "to learn coping skills to address anxiety and distress tolerance rather than rely solely on anxiety medication." See, e.g., *In re Shane M.*, 318 Conn. 569, 590, 122 A.3d 1247 (2015) (respondent's refusal to undergo medical assessment by psychiatrist for controlling diagnosed attention deficit hyperactivity disorder and other mental health issues contravened specific steps requiring him to cooperate with court-ordered

"Q. That they're gonna tell—they're gonna try and take him off of benzodiazepine. I can't even pronounce it. Benzos.

"A. The Regional Resource Group consultation, yes, recommended Hill Health Center with the hope that [the respondent] would receive therapy and medication management that would possibly not include benzodiazepine medication.

"Q. Possibly. You don't know that they would change it?

"A. Right. We don't know."

The way in which this testimony developed, with Pappagoda ultimately recognizing that the result of the reevaluation could not be predicted prior to the respondent's undertaking that process, is consistent with the other evidence at trial that suggests that the department's recommendation was for a "second opinion."

evaluations and testing and with recommendations regarding assessment and treatment).

The respondent's failure to comply with these "crucial elements" of his specific steps, as identified by the trial court, was particularly concerning given the numerous reports of the respondent presenting as impaired, including while holding M in the hospital, while holding M during a visit in 2020, while riding home from a visit in 2021, and later when engaging with APT following his positive test results for fentanyl. The court ultimately found that the respondent was "no more suitable as a sober, competent caregiver for his young children now than he was in August, 2020." Moreover, the court found the respondent not credible as to many aspects of his testimony, particularly his claimed lack of knowledge of the department's recommendations regarding therapy, his contention that he, in fact, had attended therapy, and his explanations surrounding his positive test results for fentanyl. See, e.g., *In re Bianca K.*, 188 Conn. App. 259, 270, 203 A.3d 1280 (2019) ("[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony" (internal quotation marks omitted)).

Having rejected the respondent's contention that the department required him to disengage from his medical provider and having reviewed the record before us, as well as the briefs and the arguments of the parties on appeal, we conclude that the cumulative effect of the evidence, construed in a manner most favorable to sustaining the judgments, was sufficient to justify the court's ultimate conclusions that the department had made reasonable efforts to reunify the children with the respondent, that the respondent was unwilling or unable to benefit from the services the department offered, and that the respondent failed to achieve such

a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and needs of the children, he could assume a responsible position in their lives. See, e.g., *In re Harmony Q.*, 171 Conn. App. 568, 575, 157 A.3d 137, cert. denied, 325 Conn. 915, 159 A.3d 232 (2017).

The judgments are affirmed.

In this opinion the other judges concurred.

ADRIAN MARCUS *v.* DAWN CASSARA
(AC 45592)

Moll, Suarez and Clark, Js.

Syllabus

The defendant mother appealed to this court from the trial court's adjudication of the plaintiff father's postjudgment motion for modification regarding certain orders related to child support. The parties, who were never married, have three minor children together. The father had filed a custody application requesting joint legal custody. Following a bench trial, the court awarded the parties joint legal custody of the children but ordered that the mother would have physical custody and final decision-making authority with respect to matters involving the children and that the father would have visitation rights. The court ordered the father to pay, inter alia, $528 per week as basic child support in accordance with the presumptive amount due under the child support guidelines and to share, inter alia, expenses for the children's extracurricular activities in the same proportion as the percentage allocations contained in the child support guidelines, with the father responsible for 72 percent and the mother responsible for 28 percent of those costs. Subsequently, the father filed a motion for modification, requesting that the court modify the percentage allocation for the cost of extracurricular activities such that the parties would be equally responsible for the expenses of mutually agreed upon activities. Following a hearing, the court granted the motion for modification, eliminating the requirement that the father contribute to the expenses for the children's extracurricular activities. The court explained that extracurricular activities are not regular child support and that the order regarding extracurricular activities was an extra order that was made as a deviation from the child support guidelines but that the issuing court had failed to articulate its reasons for deviating from the guidelines. *Held*:

1. The trial court exceeded its authority in modifying the order regarding the expenses for extracurricular activities to entirely eliminate the father's obligation to contribute to those expenses, the court having based its decision on a ground that was not contained in the father's motion for modification: in his motion, the father did not characterize the order as a substantial deviation from the child support guidelines or argue that the court issuing the original decision improperly failed to make the requisite findings in support thereof, and he did not request that his obligation be entirely eliminated or reduced to $0, instead, he requested that the order be modified so that each party would be "equally responsible" for the expenses of the children's extracurricular activities, i.e., that they each would pay 50 percent of those costs, and the court, therefore, improperly considered whether the extracurricular activities order was a deviation under the child support guidelines; moreover, although the father had filed numerous motions for modification, he had never challenged the court's decision to issue the extracurricular activities order as being a substantial deviation from the child support guidelines that was made without the requisite finding that the application of the guidelines would be inequitable or inappropriate, and the court improperly used the father's motion for modification as an opportunity to evaluate, sua sponte, the propriety of the order more than twelve years after it was imposed.
2. The trial court improperly concluded that the extracurricular activities order constituted a deviation from the child support guidelines, as that order was issued as a separate order, independent from the father's presumptive child support obligation: the court did not deviate from the child support guidelines in issuing the extracurricular activities order, as it was not a basic child support order issued pursuant to the statute (§ 46b-215b) governing the determination of child support award amounts, and the court was thus not required to make a specific finding on the record that application of the guidelines would be inequitable or inappropriate; moreover, because the basic child support obligation as set forth in the child support guidelines in effect at the time of the original order did not encompass the expenses for extracurricular activities, imposing an order to account for those expenses was not inconsistent with, and did not deviate from, the presumptive amount under those guidelines.

(*One judge concurring in part and concurring in the judgment*)

Argued April 11—officially released December 26, 2023

Procedural History

Application for custody of the parties' minor children, brought to the Superior Court in the judicial district of Stamford-Norwalk, and tried to the court, *Gordon*, *J.*;

judgment granting, inter alia, joint legal custody to the parties and visitation rights to the plaintiff; thereafter, the case was transferred to the judicial district of Danbury, where the court, *Hon. Heidi G. Winslow*, judge trial referee, granted in part the plaintiff's motion for modification of certain orders, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Dawn Cassara, self-represented, the appellant (defendant).

Adrian Marcus, self-represented, the appellee (plaintiff).

Opinion

SUAREZ, J. The self-represented defendant, Dawn Cassara, appeals from the judgment of the trial court granting in part a postjudgment motion for modification filed by the plaintiff, Adrian Marcus, regarding certain orders related to child support. On appeal, the defendant claims that the court improperly modified an order requiring the plaintiff to pay a percentage of the costs associated with the extracurricular activities of the parties' children. We agree and, accordingly, reverse in part the judgment of the trial court.

The record reveals the following facts and procedural history. The parties, who were never married, have three children together: a daughter born in July, 2005, and twin sons born in December, 2006. In June, 2008, the plaintiff filed a custody application requesting joint legal custody of the children, with the children's primary residence being with the defendant.

On December 10, 2009, after a bench trial, the trial court, *Gordon, J.*, issued an oral ruling that included custody and visitation orders (December, 2009 decision). The court awarded the parties joint legal custody of the children but ordered that the defendant would

have physical custody and final decision-making authority with respect to matters involving the children and that the plaintiff would have visitation rights. The court found that the plaintiff, who had his own chiropractic practice located in Greenwich, had an earning capacity of $200,000 per year, and the defendant, who was not employed at that time, had an earning capacity of $20,000 per year.[1] The court ordered the plaintiff to pay $528 per week as basic child support in accordance with the presumptive amount due under the child support guidelines and to share childcare expenses and unreimbursed medical and dental costs in accordance with the percentage allocation contained in the child support guidelines. In addition, the court ordered the parties to share expenses for the children's extracurricular activities in the same proportion as the percentage allocations contained in the child support guidelines, with the plaintiff being responsible for 72 percent and the defendant being responsible for 28 percent of those costs. Specifically, the court set forth that "the parties shall share the cost for any extracurricular activities for the minor children, so long as those activities are reasonable, also in proportion to the childcare expense calculation [in] the guidelines." In addition, the court ordered the plaintiff to maintain his medical insurance and the parties to maintain their life insurance policies for the benefit of the children. The plaintiff did not appeal from the December, 2009 decision. Nevertheless, since the entry of those initial orders, the parties have engaged in continuous litigation regarding custody, visitation, and support.

On May 3, 2021, the plaintiff filed the motion for modification that led to the ruling that is the subject of the present appeal. The plaintiff requested, among

[1] The court noted that the plaintiff's reported income had been as high as $250,000 per year prior to the parties' litigation and found the plaintiff not credible as to his stated income of less than $100,000 per year.

other things, that the court modify the percentage allocation for the cost of extracurricular activities.[2] The plaintiff contended, in relevant part, that he had paid 72 percent of the expenses for the children's extracurricular activities since the December, 2009 decision "oftentimes without [the defendant] discussing the activities with [him] ahead of time and simply just sending [him] a bill after the fact." The plaintiff further argued that the defendant was "taking advantage of unilaterally signing the children up for activities and billing [him] on activities for which he does not agree and for which he cannot afford." With respect to his financial circumstances, the plaintiff alleged that the earning capacity of $200,000 per year as found by the court in the December, 2009 decision "is more than double his actual income." The plaintiff requested, among other things, that the court modify the percentage of extracurricular activity expenses allocated to each party such that they would "be equally responsible for the expenses associated thereto for all mutually agreed upon activities . . . ."

On May 11, 2022, the court, *Hon. Heidi G. Winslow*, judge trial referee, held a remote hearing on the plaintiff's motion for modification. At the hearing, the defendant testified that the parties' children were involved in extracurricular activities such as dance, skiing, basketball, baseball, and soccer, and she explained the costs of those activities.[3] The court questioned the parties as to the basis for the order regarding the expenses for extracurricular activities as set forth in the December, 2009 decision and whether the court, in that decision, had made any finding as to "the reason for the

[2] In his motion for modification, the plaintiff also requested that the court modify and vacate an order for sanctions that the court had entered on September 12, 2016, because the plaintiff had allowed one of his life insurance policies to lapse. The court denied that request, and that portion of the court's ruling is not at issue in this appeal.

[3] The defendant testified that the plaintiff's share of the expenses for the previous year totaled $2637.43, but that the plaintiff contributed only $208.

deviation." The defendant responded that "[t]he trial court made significant findings of financial abuse back in 2009 . . . ."[4] The plaintiff's counsel initially did not address whether the court had made, or improperly failed to make, any findings regarding a deviation from the child support guidelines. Instead, she responded that "[w]hat we cited to in this motion was [that] the extracurricular activities are supposed to be discussed and agreed upon," and that the defendant had engaged in "unilateral decision-making in this case dating back in its history," even though the court issuing the December, 2009 decision "did [not] ever intend on extracurricular activities . . . to be unilateral decisions where one party just does whatever they want and bills the other party."

The court subsequently stated: "I haven't found anything in the original judgment that explains the deviation from the child support guidelines. Extracurricular activities are not regular child support, they are a deviation from the child support guidelines and the court is required to find a reason for the deviation consonant with the guidelines that are published." At that point, the plaintiff's counsel agreed with the court's concern. When the court continued to ask whether "the decision anywhere say[s] anything about the reason for the deviation," the plaintiff's counsel responded, "[n]ot that I could find, Your Honor." The plaintiff's counsel explained: "I read the decision. I did not see anywhere

[4] When issuing the December, 2009 decision, the court told the plaintiff that his "entire pattern of conduct throughout the litigation has been a pattern of financial and coercive control." The court pointed to, among other things, the plaintiff's decision to obtain, without the defendant's knowledge, a home equity line of credit on the house that the parties shared and to use those funds for purposes that did not benefit the defendant or the parties' children. The court found that the plaintiff "left [the defendant] without any cushion, without any resources and not knowing whether she was going to have enough money to live."

where [the court] discussed . . . and articulated a reason for deviating upwards to 72 percent for extracurriculars. . . . [T]his is a court of equity and . . . I respectfully ask the court to address it today. . . . [A]nd, if the court finds these extenuating circumstances, or something . . . to justify the deviation that's allowed, I would like . . . the court to articulate it."

At the conclusion of the hearing, the court issued an oral ruling granting the plaintiff's motion for modification as it pertained to the expenses for extracurricular activities. The court concluded that "the children do not have extraordinary extracurricular expenses. Considering that there are three children, yes, there are extracurricular expenses, but they are not in any way extraordinary that would warrant a deviation from the child support guidelines. And accordingly, the court is eliminating the requirement that [the plaintiff] contribute to those expenses effective June 30, 2021."[5]

When the defendant asked the court whether it was "eliminating [the plaintiff's] requirement to contribute entirely, or . . . changing the allocation," the court explained that it was eliminating the plaintiff's obligation to contribute to the cost of extracurricular activities "[e]ntirely . . . [o]n the basis that there's no reason to deviate from the guidelines." The court further explained that the order regarding extracurricular activities "is an extra order that is made as a deviation from the child support guidelines and should be explained as a deviation from the child support guidelines. But in this case no one has given me a satisfactory reason to deviate from the child support guidelines and, accordingly, I'm making the modification." The court also noted that the plaintiff "is not participating very

[5] The court explained that June 30, 2021, was the date on which the motion for modification was served on the defendant.

actively in these extracurricular activities at this point anyway. So, it certainly would not be a particular reason to have him pay."[6]

The defendant subsequently filed a motion to reargue and for reconsideration, which the court summarily denied. This appeal followed. After filing her appeal, the defendant, pursuant to Practice Book § 64-1, requested that the trial court provide a statement of its decision with respect to the motion for modification and the motion to reargue and for reconsideration.

On July 5, 2022, the court issued a memorandum of decision addressing its decisions to grant the plaintiff's motion for modification as it related to the expenses for extracurricular activities and to deny the defendant's motion to reargue and for reconsideration.[7] The court explained: "The [child support] guidelines used in 2009 were effective August 1, 2005. The guidelines used now have been effective since July 1, 2015. Both sets of guidelines require a court to articulate acceptable reasons for [a] deviation from [the] child support guidelines together with a finding that it would be inappropriate and inequitable NOT to deviate from the guidelines in the instant case. The trial court in 2009 made no statements regarding [a] deviation from the guidelines. Nor did the trial court give any reason for supposing that deviation criteria might exist. The defendant has argued at the May 31, 2022 hearing before this court that the trial judge made extensive findings regarding the plaintiff's coercive financial and emotional control of the defendant. The defendant advances the claim that the trial judge intended to make up for the history of coercive control by allowing the defendant to wield

[6] The plaintiff's counsel explained that the plaintiff "is completely separated from his children," and the plaintiff testified that his access to the children stopped in May, 2021.

[7] On June 30, 2022, the court also filed a signed transcript of its May 11, 2022 oral decision granting, in part, the plaintiff's motion for modification.

power over the plaintiff in the future regarding financial matters. In keeping with her interpretation of the trial judge's ruling that the purpose of the extracurricular order was to avenge the plaintiff's abusive and controlling behaviors during the parties' cohabitation, the defendant has been taking full advantage of that order. Without consulting at all in advance, the defendant for many years sends bills to the plaintiff for her definition of reasonable extracurricular activities and demands payment of his [72] percent. Although this court finds it unlikely that the 2009 trial court could have intended its order to be a means of revenge by the defendant, the actual reason for the order will remain a mystery.

"The trial court order regarding extracurricular activities is not typically seen in orders made by a family judge unless the parties stipulate to such an order and ask the judge to approve it. In such cases, the parties do not ask the court to deviate from the child support guidelines. Rather, they enter into a separate verbal or written contract. After that contract becomes a court order as part of a judgment, the family court may enforce it or modify it. The extracurricular activities order is not child support as contemplated by the guidelines because the court has not articulated it as a necessary deviation. It is possible, using [the] deviation criteria for the court to make an order for payment of extracurricular activities. That order must be based [on] the best interests of the child. It requires a proper finding by the judge, who incorporates it into the child support order. But it almost never happens that the issue receives that treatment when the parties have put it into a separation agreement as a contract. Since the issue of extracurricular contributions is a contract between the parties, it must be addressed by the Superior Court as contract enforcement/modification rather than by the magistrate's court. It falls to the Superior Court to decide whether the contract continues to be

fair and equitable when faced with a request to modify the order.

"It is problematic in this case that the trial judge gave no explanation for its extracurricular contributions order. It was outside the scope of the guidelines, but it was also not endorsing an agreement of the parties. If this court were to treat the order as child support, then the evidence on May 31, 2022, showed [that] the order substantially deviates from the child support guidelines. This is a cause for modification under . . . [General Statutes §] 46b-86 (a). The evidence further showed that at this time there are no extraordinary circumstances that apply for a deviation from the guidelines. No facts persuaded this court by a preponderance of the evidence that this family's finances or the children's needs were out of the ordinary to justify a deviation. The best interests of the children are not served by the extra financial order in this case.

"If this court were to treat the order as a contract imposed upon the parties by the trial judge, then this court finds circumstances have changed dramatically since 2009. The children never see or communicate with their father. He is just a financial source in their eyes. The children are not engaged in any special extracurricular activities that incur out of the ordinary costs for children of their ages or station. The defendant has been wielding the order as a weapon against the plaintiff to demand that he contribute to a large range of expenses such as casual clothing used for sports as well as everyday life and all weekend recreational pursuits of the children. At one time, she claimed the plaintiff must contribute to furniture purchased for the children to use in her home. She does not consult the plaintiff in advance of incurring [the] expenses. When he protests that he does not regard the expense as reasonable, or regard it as an extracurricular activity, or he cannot afford to contribute, the defendant vetoes his objection

and reiterates her demand for payment. She asserts she has the power to do this because she has final decision-making as to the children's activities. Given the children's attitudes toward their father, fostered in part over a long period of time by their mother, and the father's total removal from any participation in their lives, it is inappropriate and inequitable to require the plaintiff to continue contributing to extracurricular activities."

With respect to the defendant's motion to reargue and for reconsideration, the court explained that the defendant continued to make the same arguments that she made at the hearing on the motion to modify, which the court already had rejected. The court further explained that "[t]his court has not declared any of the trial judge's orders to be invalid but has ruled that the order addressing extracurricular activities is subject to modification. The evidence called for a modification. No part of the May 31 decision required a finding of a change in the earning capacity of the plaintiff. Nor did the court find that there had been such a change."

On appeal, the defendant claims that the court improperly modified the order regarding the expenses for extracurricular activities to entirely eliminate the plaintiff's obligation to contribute to those expenses. Specifically, the defendant contends that there had been no substantial change in the financial circumstances of the parties, the court improperly based its decision on a ground that it raised, sua sponte, which was not contained in the plaintiff's motion for modification, and the court improperly relied on "irrelevant, nonfinancial" factors. We agree with the defendant.

The following standard of review and legal principles guide our analysis of the defendant's claim. "The scope of our review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the

questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Nevertheless, we may reverse a trial court's ruling on a modification motion if the trial court applied the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Olson* v. *Mohammadu*, 310 Conn. 665, 671, 81 A.3d 215 (2013). In addition, "[t]he question of whether, and to what extent, the child support guidelines apply . . . is a question of law over which this court should exercise plenary review." *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 367, 999 A.2d 721 (2010).

"Our case law is clear that § 46b-86 (a) creates two alternative circumstances in which a court can modify a child support order. . . . Those circumstances are when there is (1) a showing of a substantial change in the circumstances of either party or (2) a showing that the final order for child support substantially deviates from the child support guidelines absent the requisite findings."[8] (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Righi* v. *Righi*, 172 Conn. App. 427, 433, 160 A.3d 1094 (2017). "Both the substantial change of circumstances and the substantial deviation from child support guidelines' provision establish

[8] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a, unless there was a specific finding on the record at a hearing, or in a written judgment, order or memorandum of decision of the court, that the application of the guidelines would be inequitable or inappropriate. . . ."

the authority of the trial court to modify existing child support orders to respond to changed economic conditions. The first allows the court to modify a support order when the financial circumstances of the individual parties have changed, regardless of their prior contemplation of such changes. The second allows the court to modify child support orders that were once deemed appropriate but no longer seem equitable in the light of changed social or economic circumstances in the society as a whole . . . .'' (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 128 Conn. App. 558, 561, 17 A.3d 535 (2011).

''When presented with a motion to modify child support orders on the basis of a substantial change in circumstances, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and . . . make an order for modification. . . . A party moving for a modification of a child support order must clearly and definitely establish the occurrence of a substantial change in circumstances of either party that makes the continuation of the prior order unfair and improper.'' (Internal quotation marks omitted.) *Robinson* v. *Robinson*, 172 Conn. App. 393, 400–401, 160 A.3d 376, cert. denied, 326 Conn. 921, 169 A.3d 233 (2017).

A court also ''has the power to modify a child support order on the basis of a substantial deviation from the guidelines independent of whether there has been a substantial change in the circumstances of [either] party''; (internal quotation marks omitted) *Righi* v. *Righi*, supra, 172 Conn. App. 433; if that deviation was made ''without the requisite specific finding that [the] application of the guidelines would be inequitable or

inappropriate." Id., 434; see also id., 436–37 ("three distinct findings [are required] in order for a court to properly deviate from the child support guidelines in fashioning a child support order: (1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding that application of such guidelines would be inequitable and inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation"). "[O]nce the court enters an order of child support that substantially deviates from the guidelines, and makes a specific finding that the application of the amount contained in the guidelines would be inequitable or inappropriate, as determined by the application of the deviation criteria established in the guidelines, that particular order is no longer modifiable solely on the ground that it substantially deviates from the guidelines. By the same token, in the absence of such a specific finding, the order is continually subject to modification on the ground of a substantial deviation from the guidelines."[9] (Internal quotation marks omitted.) *Moore* v. *Moore*, 216 Conn. App. 179, 192, 283 A.3d 994 (2022).

"In the context of a trial court's consideration of a motion to modify, the [child support] guidelines become relevant only after a change in circumstances has been shown, if that is the ground urged in support of modification . . . or in determining whether the existing child support order substantially deviates from the guidelines, if that is the ground urged in support of modification." (Emphasis omitted; internal quotation marks omitted.) *Brown* v. *Brown*, 199 Conn. App. 134, 158, 235 A.3d 555 (2020).

In the present case, we first conclude that the court exceeded its authority in modifying the order regarding

[9] The legal principles governing child support orders and the application of the child support guidelines will be discussed in greater detail subsequently in this opinion.

the costs of extracurricular activities because it based its decision on a ground that was not contained in the plaintiff's motion for modification.[10]

"[I]n the context of motions to modify support orders, we have held that a court's reliance on a ground not

[10] We are not persuaded by the plaintiff's argument that the defendant waived this aspect of her claim. We acknowledge that, at the May 11, 2022 hearing, the defendant did not specifically object to the court's sua sponte consideration of whether the extracurricular activities order constituted an unjustified deviation from the guidelines, and, instead, she responded to the merits of the court's questions, which were predicated on its characterization of the extracurricular activities order as a deviation. The defendant, however, was self-represented before the trial court, as she is on appeal. "Although self-represented parties are not excused from complying with relevant rules of procedural and substantive law, [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants . . . ." (Internal quotation marks omitted.) *Gutierrez* v. *Mosor*, 206 Conn. App. 818, 835, 261 A.3d 850, cert. denied, 340 Conn. 913, 265 A.3d 926 (2021). On the basis of our review of the record, we are not convinced that the defendant intentionally waived her claim. See *Gagne* v. *Vaccaro*, 80 Conn. App. 436, 445–46, 835 A.2d 491 (2003) (explaining that "[w]aiver is an *intentional* relinquishment or abandonment of a *known* right or privilege," and that party may waive claim of law if she "knows of the existence of the claim and of its reasonably possible efficacy" (emphasis added; internal quotation marks omitted)), cert. denied, 268 Conn. 920, 846 A.2d 881 (2004).

Significantly, there is nothing in the record to suggest that the defendant had notice that the court might consider modifying the extracurricular activities order on the basis that it constituted a substantial deviation from the child support guidelines. See *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 517, 522–23, 146 A.3d 26 (2016) (considering whether actions occurring prior to hearing placed party on notice as to unpleaded issues or facts). To the contrary, our review of the transcript of the May 11, 2022 hearing reveals the defendant's surprise or confusion when, at the conclusion of the hearing, the court entirely eliminated the plaintiff's obligation to contribute to the extracurricular expenses rather than simply modifying the percentage allocation as the plaintiff had requested. See id., 519 (considering whether defendant was unduly prejudiced or surprised by court's consideration of ground not raised in plaintiff's motion for modification). The defendant immediately sought clarification of the court's ruling and questioned the basis of its decision. Indeed, in the defendant's subsequent motion to reargue and for reconsideration, she emphasized, among other things, that "[a]t no time has the validity of [the extracurricular activities order] been questioned by [the plaintiff] or any of his attorneys." Accordingly, under the circumstances of the present case, we do not view the defendant's failure to object at the hearing to the procedural deficiency of the court's decision—its reliance on a ground not raised in the plaintiff's motion for modification—as a waiver of her claim on appeal.

raised in a motion to modify is an abuse of discretion in the absence of an amendment to the motion." *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 514, 146 A.3d 26 (2016). In the present case, the court modified the extracurricular activities order on the ground that it was an unjustified deviation from the guidelines. The plaintiff, however, filed his motion for modification on the ground that there had been "material changes in circumstances" as a result of the defendant "unilaterally" signing the children up for extracurricular activities "for which he does not agree and for which he cannot afford." As set forth previously, a substantial change in the financial circumstances of the parties and a substantial deviation from the child support guidelines are two alternative, independent grounds for granting a motion for modification. See *Righi* v. *Righi*, supra, 172 Conn. App. 433; see also *Brown* v. *Brown*, supra, 199 Conn. App. 158.

In his motion for modification, the plaintiff did not characterize the order as a substantial deviation from the child support guidelines or argue that the court issuing the December, 2009 decision improperly failed to make the requisite findings in support thereof. In fact, he did not request that his obligation be entirely eliminated or reduced to $0 and, instead, he requested that the order be modified so that each party would be "equally responsible" for the expenses of the children's extracurricular activities, i.e., that they each would pay 50 percent of those costs. The court, therefore, improperly considered whether the extracurricular activities order was a deviation under the child support guidelines and modified the order on a ground not contained in the plaintiff's motion for modification. See *Prial* v. *Prial*, 67 Conn. App. 7, 13–14, 787 A.2d 50 (2001) (trial court improperly considered child support guidelines where plaintiff did not allege substantial deviation from guidelines to support his request for modification); see also

De Almeida-Kennedy v. *Kennedy*, 188 Conn. App. 670, 679, 205 A.3d 704 (trial court properly did not make findings under child support guidelines where defendant did not raise claim that child support obligation substantially deviated from guidelines), cert. denied, 332 Conn. 909, 210 A.3d 566 (2019).

Although the plaintiff has filed numerous motions for modification, including the motion at issue in the present case, he has never challenged the court's decision to issue the extracurricular activities order as being a substantial deviation from the child support guidelines that was made without the requisite finding that the application of the guidelines would be inequitable or inappropriate. We conclude that, under the circumstances of the present case, the court improperly used the plaintiff's motion for modification as an opportunity to evaluate, sua sponte, the propriety of the order more than twelve years after it was imposed.[11]

We also disagree with the court's conclusion that the extracurricular activities order constituted a deviation from the child support guidelines. It is helpful in our analysis to provide an overview of the legal principles governing custody and support orders issued pursuant to General Statutes § 46b-56 and basic child support orders issued pursuant to General Statutes § 46b-215b. We do so in order to illustrate the different purposes of orders imposed under those provisions. "[Section] 46b-56 grants authority to the court to render orders of custody and provides in relevant part: '(a) In any controversy before the Superior Court as to the custody or care of minor children . . . the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . .

[11] To be clear, we do not suggest that a court would be unable to modify a child support order on the basis that it substantially deviates from the guidelines if that order is the result of a deviation that was made without the requisite findings and a party seeks modification on that basis.

Subject to the provisions of section 46b-56a, the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent . . . . (b) In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests.' "[12] (Emphasis omitted.) *Powers* v. *Hiranandani*, 197 Conn. App. 384, 405–406, 232 A.3d 116 (2020). This court has indicated that orders to pay for extracurricular activities can fall within the purview of § 46b-56. See id.

Section 46b-215b, on the other hand, governs basic child support orders to be issued in accordance with the child support guidelines. Specifically, § 46b-215b (a) provides: "The child support and arrearage guidelines issued pursuant to section 46b-215a, adopted as regulations pursuant to section 46b-215c, and in effect on the date of the support determination shall be considered in all determinations of child support award amounts, including any current support, health care coverage, child care contribution and past-due support amounts, and payment on arrearages and past-due support within the state. In all such determinations, there shall be a rebuttable presumption that the amount of such awards

[12] Subsection (e) of General Statutes § 46b-56 provides: "In determining whether a child is in need of support and, if in need, the respective abilities of the parents to provide support, the court shall take into consideration all the factors enumerated in section 46b-84."

General Statutes § 46b-84 (d) provides: "In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child."

which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record at a hearing, or in a written judgment, order or memorandum of decision of the court, that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under the deviation criteria established by the Commission for Child Support Guidelines under section 46b-215a, shall be required in order to rebut the presumption in such case."

In accordance with the statutory directives set forth in § 46b-215b (a), § 46b-215a-1 (6) of the Regulations of Connecticut State Agencies defines a "[c]hild support award" as "the entire payment obligation of the noncustodial parent, *as determined under the child support and arrearage guidelines*, and includes *current support payments*, *health care coverage*, *child care contribution and periodic payments on arrearages*." (Emphasis added.) We emphasize that a "child support award," therefore, does not encompass any and all payments to be made by a noncustodial parent; the term plainly refers only to that obligation imposed upon a noncustodial parent by application of the guidelines. Section 46b-215a-1 (7) of the regulations further defines "[c]urrent support" as "an amount for the ongoing support of a child, exclusive of arrearage payments, health care coverage and a child care contribution."[13]

In the present case, the court that issued the December, 2009 decision properly considered and applied the child support guidelines in accordance with § 46b-215b (a). The court explicitly stated that it calculated the child support obligation "in accordance with the child support guidelines," and, thus, did not deviate from the

[13] The regulations in effect at the time of the December, 2009 decision contained identical language. See Regs., Conn. State Agencies § 46b-215a-3 (a) (2005) (repealed July 1, 2015).

presumptive amount when it ordered the plaintiff to pay basic child support in the amount of $528 per week.

The order allocating the expenses of the children's extracurricular activities was issued as a separate order, independent from the plaintiff's presumptive child support obligation, in accordance with § 46b-56.[14] We conclude that the court did not deviate from the child support guidelines in issuing the extracurricular activities order, as it was not a basic child support order issued pursuant to § 46b-215b, and, therefore, the court was not required to make a specific finding on the record that application of the guidelines would be inequitable or inappropriate.

In reaching this conclusion, we consider the 2005 Child Support and Arrearage Guidelines, which were the guidelines in effect at the time of the December, 2009 decision. See, e.g., *Schull* v. *Schull*, 163 Conn. App. 83, 93, 134 A.3d 686 (considering child support guidelines in effect at time of court's original support order), cert. denied, 320 Conn. 930, 133 A.3d 461 (2016). Neither the guidelines nor the preamble accompanying those guidelines suggests that the expenses for extracurricular activities are encompassed within the presumptive amount of child support set forth therein, or that an extracurricular activities order would constitute a deviation from the guidelines. See Regs., Conn. State Agencies § 46b-215a-3 (b) (2005) (listing deviation criteria as "(1) [o]ther financial resources available to a parent . . . (2) [e]xtraordinary expenses for care and maintenance of the child . . . (3) [e]xtraordinary parental expenses . . . (4) [n]eeds of a parent's other

[14] As we will more fully explain in our analysis, the fact that the court awarded an amount of basic child support that did not reflect any deviation from the presumptive amount as set forth in the guidelines plainly reflects that the order of basic child support did not include extracurricular activities expenses. Thus, we logically characterize the order to pay for such expenses as being separate and distinct from the order to pay basic child support.

dependents . . . (5) [c]oordination of total family support . . . [and] (6) [s]pecial circumstances . . . .").

The guidelines do, however, make clear that "[t]he presumptive current support amount for each parent is equal to that parent's share of the *basic* child support obligation . . . ." (Emphasis added.) Regs., Conn. State Agencies § 46b-215a-2b (c) (6) (2005); see also Regs., Conn. State Agencies § 46b-215a-2b (c) (3) (2005) (providing instructions to "[d]etermine the *basic* child support obligation" (emphasis added)). The guidelines' use of the word "basic" to modify "child support" is instructive to our analysis. Specifically, the description of that child support as basic, according to the ordinary meaning of that term, suggests that it accounts for fundamental, or essential, expenses. See Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 101 (defining "basic" in relevant part as "of, relating to, or forming the base or essence: fundamental . . . constituting or serving as the basis or starting point"); id., p. 507 (defining "fundamental" in relevant part as "of or relating to essential structure, function, or facts").

As one Superior Court judge has accurately articulated, "Connecticut's [child support] guidelines neither list nor define specific expenditures that comprise child support, but it is clear that such general categories of *basic need* like food, housing, clothing and transportation are fairly considered a part of child support. The cost of children's [extracurricular] or 'enrichment' activities are not part of child support." (Emphasis added.) *Scott* v. *Scott*, Superior Court, judicial district of Hartford, Docket No. FA-04-4005987-S (March 24, 2014). Although we do not attempt to delineate all of the child-rearing costs included in the presumptive amount of child support, we conclude that expenses for extracurricular activities are not among the basic expenses taken into consideration by the guidelines, which is why courts routinely issue separate orders to

account for those expenses, as set forth subsequently in this opinion.

The preamble to the child support guidelines further supports our conclusion that the guidelines do not account for the expenses of extracurricular activities.[15] See *Maturo* v. *Maturo*, 296 Conn. 80, 92–93, 995 A.2d 1 (2010) ("[t]he guidelines are accompanied by a preamble that is not part of the regulations but is intended to assist in their interpretation"). The preamble explains that the guidelines are based on the income shares model, which "presumes that the child should receive the same proportion of parental income as he or she would have received if the parents lived together." Child Support and Arrearage Guidelines (2005), preamble, § (d), p. ii. The preamble further explains that the schedule of basic child support obligations is "based on economic data on child-rearing costs," gathered by a Consumer Expenditure Survey. Id., § (e) (1), p. iii. That

[15] The guidelines set forth ample deviation criteria, including "[b]est interests of the child." See Regs., Conn. State Agencies § 46b-215-5c (b) (6) (D). Although the 2015 Child Support and Arrearage Guidelines are not binding upon the ruling at issue in the present appeal; see *Schull* v. *Schull*, supra, 163 Conn. App. 93 (considering child support guidelines in effect at time of court's original support order); it is nonetheless helpful to our analysis to note that, in the preamble to the 2015 Child Support and Arrearage Guidelines, the commission noted that it had "considered adding extracurricular expenses to the currently listed [deviation] criteria of education expenses, unreimbursable medical expenses, and expenses for special needs. The commission decided not to add extracurricular expenses as a separate section under the category 'extraordinary expenses for care and maintenance of the child' reasoning that extracurricular expenses could be addressed under the criteria of best interests of the child under the 'special circumstances' heading." Child Support and Arrearage Guidelines (2015), preamble, § (j) (2), p. xxi.

This discussion clearly supports the conclusion that the expenses for extracurricular activities are not included in the presumptive amount of basic child support set forth in the guidelines. To conclude otherwise would thwart the commission's expressed intent that such expenses are a possible basis to deviate from the presumptive amount of basic child support set forth in the guidelines. Moreover, although the commission suggests in the 2015 preamble that a court could address extracurricular expenses as a deviation criterion, it certainly does not mandate that a court must do so.

survey data "includes information on several hundred items purchased by households," which the Bureau of Labor Statistics "categorizes . . . into several major categories, *such as food*, *housing*, *clothing*, *transportation*, *and health care*." (Emphasis added.) Id. Our conclusion that the presumptive child support amount accounts for essential expenses such as the foregoing is consistent with the preamble's explanation of why the percentages set forth in the schedule of basic child support obligations decline as parental income increases. The preamble specifically notes that "economic studies have found that spending on children declines as a proportion of family income as that income increases, and a diminishing portion of family income is spent on each additional child"; id., § (d), p. iii; and suggests that spending declines because "families at higher income levels do not have to devote most or all of their incomes to *perceived necessities*." (Emphasis added.) Id., § (e) (4) (A), p. iv; see also *Maturo* v. *Maturo*, supra, 296 Conn. 93 ("[c]hildren's *economic needs* do not increase automatically . . . with an increase in household income" (emphasis added)).

Because the basic child support obligation as set forth in the child support guidelines does not encompass the expenses for extracurricular activities, imposing an order to account for those expenses is not inconsistent with, and does not deviate from, the presumptive amount under those guidelines. See *Maturo* v. *Maturo*, supra, 296 Conn. 107 (differentiating between "the basic child support obligation" and "additional support obligations imposed on the noncustodial parent for education, health care, *recreation*, insurance and other matters" (emphasis added)).

Both this court and our Supreme Court have considered numerous cases in which a trial court has imposed an order allocating between parties the costs of their children's extracurricular activities, separate from the

basic child support obligation calculated in accordance with the guidelines. See, e.g., *McKeon* v. *Lennon*, 321 Conn. 323, 329, 138 A.3d 242 (2016) (trial court ordered parties to share all costs over $150 for children's extracurricular activities in addition to defendant's weekly child support obligation); *Olson* v. *Mohammadu*, supra, 310 Conn. 668 (trial court ordered defendant to pay 66 percent of child's extracurricular activities expenses in addition to weekly child support); *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 363 (trial court ordered defendant to pay 67 percent of expenses for extracurricular activities for minor children in addition to weekly child support); *Maturo* v. *Maturo*, supra, 296 Conn. 107 (trial court imposed additional support obligation, separate from basic child support obligation, requiring defendant to pay all expenses relating to children's extracurricular activities); *Leonova* v. *Leonov*, 201 Conn. App. 285, 332 n.35, 242 A.3d 713 (2020) (court ordered parties to share equally the cost of extracurricular activities), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021); *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 389, 210 A.3d 620 (2019) (in addition to plaintiff's weekly child support obligation imposed in accordance with child support guidelines, court ordered parties to share equally in cost of children's extracurricular activities); *Ray* v. *Ray*, 177 Conn. App. 544, 549, 569, 573 n.15, 173 A.3d 464 (2017) (court ordered defendant to pay presumptive minimum child support amount, in compliance with child support guidelines, and entered separate orders requiring defendant to pay one half of child's expenses for extracurricular activities); *Brady-Kinsella* v. *Kinsella*, 154 Conn. App. 413, 424, 106 A.3d 956 (2014) (court ordered defendant to pay 61 percent of extracurricular expenses in addition to weekly sum of child support), cert. denied, 315 Conn. 929, 110 A.3d 432 (2015); *Blum* v. *Blum*, 109 Conn. App. 316, 318, 951 A.2d 587 (trial court ordered defendant to pay 90 percent

of extracurricular expenses in addition to basic child support), cert. denied, 289 Conn. 929, 958 A.2d 157 (2008).[16]

In our review of the appellate case law, we found only one case, *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 733–34, 147 A.3d 188 (2016), in which this court determined that an extracurricular activities order was improperly imposed. In *Ferraro*, however, the order was not improper on the basis that it had been an unjustified deviation from the child support guidelines. Instead, this court determined that the trial court abused its discretion in imposing the extracurricular activities order because neither party had requested such an order and, at trial, there had been no testimony presented as to any extracurricular activities undertaken by the children or what the expenses of such activities would be. Id., 734. This court concluded: "Simply put, there is no evidence supporting the need for an order that allocates the expenses of extracurricular

[16] Notably, although the propriety of the orders was not at issue in many of these cases, neither this court nor our Supreme Court characterized the extracurricular activities orders as deviations from the guidelines.

In addition, although the court in the present case reasoned that extracurricular activities orders are "not typically seen" unless the parties agree to such an order, none of these cases cited involved agreements between the parties. Nevertheless, there are numerous additional cases in which the parties themselves account for the expenses of extracurricular activities separately from basic child support. See, e.g., *Blondeau* v. *Baltierra*, 337 Conn. 127, 147 n.19, 252 A.3d 317 (2020) (parties entered into stipulation pendente lite providing that defendant would pay, among other things, 73 percent of children's extracurricular expenses in addition to weekly child support); *Scott* v. *Scott*, 215 Conn. App. 24, 29 and n.3, 282 A.3d 470 (2022) (parties agreed that plaintiff would pay, among other things, 60 percent of children's extracurricular expenses); *Barber* v. *Barber*, 193 Conn. App. 190, 194 and n.4, 219 A.3d 378 (2019) (parties' agreement required defendant to pay "add-on child support," for, among other things, summer camp and extracurricular activities, in addition to basic child support); *Kupersmith* v. *Kupersmith*, 146 Conn. App. 79, 81–82, 78 A.3d 860 (2013) (parties' separation agreement provided that defendant would pay 85 percent of expenses for extracurricular activities in addition to monthly child support).

activities between the parties." Id. In the present case, unlike in *Ferraro*, the defendant specifically requested an order for the expenses of extracurricular activities in her proposed order submitted to the court prior to the December, 2009 decision, which supported the need for such an order. Thus, the court here could properly exercise its discretion to issue an extracurricular activities order.

This court most recently upheld an order allocating expenses for extracurricular activities in *Powers* v. *Hiranandani*, supra, 197 Conn. App. 406. In *Powers*, the trial court ordered the defendant to pay, among other things, 53 percent of the expenses for the extracurricular activities of the parties' child, in accordance with the percentage allocation set forth in the child support guidelines. Id., 390–91 n.4. At the time of the court's order, the parties' child was three years old. Id., 404. The defendant testified that the child participated in swimming, ice skating, and visits to a nature center, with the cost of those activities being $1 per week, as listed on the plaintiff's financial affidavit. Id. On appeal, the defendant challenged the extracurricular activities order on the basis that "it does not contain an upper limit and there is no evidence of the child's extracurricular activities." Id. This court rejected both arguments, explaining: "At the time of dissolution, the cost of the child's extracurricular activities as listed on the plaintiff's financial affidavit was de minimus. The defendant has failed to demonstrate how he is harmed by the court's order, now, or will be harmed in the future. The trial court could not speculate as to the child's future interests, activities, and the costs thereof. It merely provided a means for the parties to pay for them in the present." Id., 405. This court further explained that, "[i]f there is a substantial change in circumstances that

warrants a change in the court's order regarding payment of the child's extracurricular activities, the defendant is not without a remedy," and cited § 46b-56, providing for the modification of custody orders. Id., 405–406. Accordingly, this court concluded that the trial court did not abuse its discretion in issuing the order regarding expenses for extracurricular activities. Id., 406.

In the present case, like in *Powers*, the court that issued the December, 2009 decision was considering the allocation of expenses for extracurricular activities when those costs were de minimus, as all three of the parties' children were under the age of five at that time. Because the court "could not speculate as to the [children's] future interests, activities, and the costs thereof"; id., 405; its extracurricular activities order provided a means for the parties to pay for those unknown costs in the future, separate from the plaintiff's basic child support obligation. In doing so, the court did not deviate from the child support guidelines and, like the court in *Powers*, simply used the percentage allocations contained in the guidelines to divide those costs. See id., 390–91 n.4 (describing orders regarding financial responsibilities of parties with respect to child as being "[c]onsistent with the child support guidelines").

The court, in the present case, ordered a total child support award of $528 per week, and for the parties to share childcare expenses and unreimbursed medical and dental costs, in accordance with the child support guidelines, and, therefore, it did not deviate from the guidelines. The court's separate order to pay for the children's extracurricular activities is not included in the definition of a "[c]hild support award" under § 46b-215a-1 (6) of the regulations, which means the entire payment obligation *as determined under the guidelines* and includes only "current support payments, health care

coverage, child care contribution and periodic payments on arrearages." Regs., Conn. State Agencies § 46b-215a-1 (6). The language in § 46b-215b (a) reflects that a deviation from the child support guidelines refers only to the total child support *award* amount and does not encompass *all* child support orders, like in the case of a separate order to pay for the expenses of extracurricular activities. The court could have exercised its discretion to deviate from the presumptive child support award by increasing or decreasing the total child support award to reflect the expenses of extracurricular activities; see footnote 15 of this opinion; but it was not required to do so. Instead, the court, in its broad discretion, chose not to deviate from the presumptive child support award and issued a separate order under § 46b-56, as appears to have been the case in *Powers*, to allocate the expenses for the children's extracurricular activities. Because the court in the present case did not deviate from the child support guidelines in issuing the extracurricular activities order, we conclude that it was not required to make the findings that must accompany a deviation.

To be clear, we do not suggest that the extracurricular activities order is not subject to modification. Instead, we conclude that the order was not modifiable on the basis that it was a substantial deviation from the guidelines. The court considering the plaintiff's motion for modification still had the ability to modify the extracurricular activities order on the basis of a substantial change in the circumstances of either party; see *Powers* v. *Hiranandani*, supra, 197 Conn. App. 405–406; and, in the present case, the plaintiff argued that there had been "material changes in circumstances" because the defendant was unilaterally[17] signing the children up for

[17] To the extent that the court implied that the defendant was required, pursuant to the December, 2009 decision, to consult with the plaintiff prior to incurring the expenses for extracurricular activities, or that the expenses must have been agreed upon between the parties, we disagree. Although the court issuing the December, 2009 decision ordered that both parties "are

activities "[that] he cannot afford." In its ruling, the court did not consider the financial reasons on which the plaintiff relied, expressly observing that it had not decided the motion on this basis. Accordingly, on remand, the court should consider the merits of this basis for modification in adjudicating the plaintiff's motion.

The judgment is reversed and the case is remanded with direction to reconsider the plaintiff's motion to modify the extracurricular activities order in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion MOLL, J., concurred.

CLARK, J., concurring in part and concurring in the judgment. I agree with the majority that the trial court improperly modified the child support award on the ground that it constituted a substantial deviation from the child support guidelines because the plaintiff, Adrian Marcus, did not raise that ground in his motion for modification. I therefore concur that reversal of the judgment is appropriate on that basis. I write separately, however, because I disagree with the court's additional conclusion that the trial court would have lacked the authority to modify the order even if the plaintiff had moved to modify the award pursuant to General Statutes § 46b-86 (a) on the basis that it constituted a substantial deviation from the child support guidelines

to be notified of and participate in all school programs and all extracurricular activities," the court also gave the defendant final decision-making authority and, at the start of its orders, explicitly stated: "I just want to be perfectly clear that I do not believe in this case that shared decision-making, the consulting back and forth between each other is a good idea for the children. The dynamic between the two of you is poisonous and bad. Until each of you can prove by your actions that you can do that workably, it's not in their best interest."

absent a specific finding on the record that the application of the child support guidelines would be inequitable or inappropriate.

In my view, the child support guidelines must be considered in all determinations of child support award amounts and the amount resulting from the application of the child support guidelines is the presumptively correct amount a court is to order. To order something other than the presumptive support amounts, our law requires a court to make a specific finding on the record that the application of the guidelines would be inequitable or inappropriate and an explanation as to which deviation criteria, under the guidelines, the court relied on to justify the deviation from the presumptive amount. In the absence of such a finding, an award is continually subject to modification under § 46b-86 (a).

Although the child support award in this case was an amount greater than the presumptive amount calculated in accordance with the child support guidelines, the majority concludes that the trial court could have, but was not required, to follow the mandates of General Statues § 46b-215b (a) and § 46b-215a-5c (a) of the Regulations of Connecticut State Agencies by making a specific finding on the record that the application of the guidelines would be inequitable or inappropriate and an explanation as to which deviation criteria under the guidelines the court was relying on in deviating from the presumptive amount.[1] The majority concludes that

[1] General Statutes § 46b-215b (a) provides: "The child support and arrearage guidelines issued pursuant to section 46b-215a, adopted as regulations pursuant to section 46b-215c, and in effect on the date of the support determination shall be considered in all determinations of child support award amounts, including any current support, health care coverage, child care contribution and past-due support amounts, and payment on arrearages and past-due support within the state. In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record at a hearing, or in a written judgment, order or memorandum of decision of the court, that the application of the guidelines would be inequitable or inappropriate in a particular case, as deter-

the court's award of costs for extracurricular activities in this case was "a separate order, independent from the plaintiff's presumptive child support obligation," which allowed the court to disregard the requirements of § 46b-215b (a) and § 46b-215a-5c (a) of the regulations. As a result, it also concludes that the court lacked the authority to modify the child support award pursuant to § 46b-86 (a).

For the reasons that follow, I believe the majority's decision is inconsistent with our statutory and regulatory scheme, which requires that the child support and arrearage guidelines be considered in *all* determinations of child support award amounts.

I

It is helpful to begin with a brief overview of the relevant legal principles at play. "The legislature has enacted several statutes to assist courts in fashioning child support orders." *Maturo* v. *Maturo*, 296 Conn. 80, 89, 995 A.2d 1 (2010). The legislature, for example, has established a commission to issue child support and arrearage guidelines to ensure the appropriateness of child support awards. See General Statutes § 46b-215a (a). The law makes clear that "[t]he child support and arrearage guidelines . . . shall be considered in *all* determinations of child support award amounts, including any current support, health care coverage, child care contribution and past-due support amounts, and payment on arrearages and past-due support within the state." (Emphasis added.) General Statutes § 46b-215b (a). "In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record

mined under the deviation criteria established by the Commission for Child Support Guidelines under section 46b-215a, shall be required in order to rebut the presumption in such case."

at a hearing, or in a written judgment, order or memorandum of decision of the court, that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under the deviation criteria established by the [commission] . . . shall be required in order to rebut the presumption in such case." General Statutes § 46b-215b (a).

Section 46b-215a-5c (a) of the regulations reiterates the mandates of § 45b-215b. It provides in relevant part: "The current support, health care coverage contribution, and child care contribution amounts calculated under section 46b-215a-2c of the Regulations of Connecticut State Agencies, and the amount of the arrearage payment calculated under section 46b-215a-3a of the Regulations of Connecticut State Agencies, are presumed to be the correct amounts to be ordered. The presumption regarding each such amount may be rebutted by a specific finding on the record that such amount would be inequitable or inappropriate in a particular case. . . . Any such finding shall state the amount that would have been required under such sections and include a factual finding to justify the variance. Only the deviation criteria stated in . . . subdivisions (1) to (6), inclusive, of subsection (b) of this section . . . shall establish sufficient bases for such findings."[2] Regs., Conn. State Agencies § 46b-215a-5c (a).

Thus, in order to deviate from the presumptive support amounts, our courts have interpreted the statutory and regulatory language as requiring three distinct findings: "(1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding

[2] Although there was a different operative regulation at the time that the extracurricular order was issued; see Regs., Conn. State Agencies § 46b-215a-3 (a) (2005) (repealed July 1, 2015); that earlier regulation contained language substantially identical to the present language (two regulations referenced in 2005 regulation have been renumbered in current regulation). For ease of discussion, I cite to the current regulation in this concurrence.

that application of such guidelines would be inequitable [or] inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation." *Righi* v. *Righi*, 172 Conn. App. 427, 436–37, 160 A.3d 1094 (2017); see also *Wallbeoff* v. *Wallbeoff*, 113 Conn. App. 107, 113, 965 A.2d 571 (2009).

A failure to make the appropriate finding can have real and meaningful consequences. See, e.g., *McHugh* v. *McHugh*, 27 Conn. App. 724, 729, 609 A.2d 250 (1992) ("[s]uch specific finding . . . has very real and meaningful consequences and must be made by the court anytime the court enters a child support award that deviates from the child support guidelines"). Indeed, in the absence of a specific finding, the child support order is continually subject to modification pursuant to § 46b-86 (a). See *Moore* v. *Moore*, 216 Conn. App. 179, 195, 283 A.3d 994 (2022); see also General Statutes § 46b-86 (a). "[A] court has the power to modify a child support order on the basis of a substantial deviation from the guidelines independent of whether there has been a substantial change in the circumstances of the party." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 104 Conn. App. 482, 495, 934 A.2d 306 (2007), cert. denied, 285 Conn. 911, 943 A.2d 472 (2008).

II

In the present case, the trial court, in concluding that Judge Gordon's 2009 child support award was subject to modification under the substantial deviation ground for modification under § 46b-86 (a), found that "[t]he [child support] guidelines used in 2009 were effective August 1, 2005. The guidelines used now have been effective since July 1, 2015. Both sets of guidelines require a court to articulate acceptable reasons for deviation from child support guidelines together with a finding that it would be inappropriate and inequitable NOT to deviate from the guidelines in the instant case. [Judge

Gordon] in 2009 made no statements regarding deviation from the guidelines. Nor did [she] give any reason for supposing that deviation criteria might exist." The court therefore concluded that modification was appropriate on the basis of a substantial deviation from the child support guidelines.

Although the majority states that Judge Gordon's 2009 child support order requiring the plaintiff to pay a portion of the children's extracurricular expenses could have been ordered as a deviation under the guidelines if the court wished to consider the guidelines, it concludes that Judge Gordon's award of costs for extracurricular activities in this particular case, which resulted in an amount that exceeded the presumptive child support award amount under the child support guidelines, was instead issued as a "separate order" pursuant to the court's broad authority to enter support orders under General Statutes § 46b-56 and therefore did not constitute a deviation from the presumptive child support amounts. As a result, it further concludes that Judge Gordon was not required to make a specific finding that the application of the child support guidelines would be inequitable or inappropriate or provide an explanation as to which deviation criteria the court relied on to justify the deviation from the presumptive amounts. Under the majority's interpretation, trial courts have broad discretion either to apply the child support guidelines when ordering amounts that exceed the presumptive amount under the guidelines or, instead, to achieve an identical result by issuing a "separate" order without applying or following the guidelines. I believe the majority's interpretation is inconsistent with our statutory and regulatory scheme.

Our legislature has made its intent clear that a child support award is to be made in accordance with the child support guidelines and is presumptively comprised of four components: current support payments,

health care coverage, childcare contribution, and periodic payments on arrearages. See General Statutes § 46b-215b (a); see also Regs., Conn. State Agencies § 46b-215a-1 (6). Those four categories of payments are calculated through the application of the child support guidelines and together comprise the presumptive support award amounts. See General Statutes § 46b-215b (a) ("there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered"). In order to award an amount greater than the presumptive amount calculated by the application of the child support guidelines, a court must make a specific finding that the presumptive amount would be inequitable or inappropriate and point to specific deviation criteria under the guidelines that would justify a deviation from the presumptive award amounts. See General Statutes § 46b-215b (a); Regs., Conn. State Agencies § 46b-215a-5c (a); *Righi* v. *Righi*, supra, 172 Conn. App. 436–37.

Our child support statutes and our case law make clear that "[t]he child support . . . guidelines . . . in effect on the date of the support determination *shall be considered in all determinations of child support award amounts* . . . ." (Emphasis added.) General Statutes § 46b-215b (a); see also *Tuckman* v. *Tuckman*, 308 Conn. 194, 205, 61 A.3d 449 (2013) ("the legislature has thrown its full support behind the guidelines, expressly declaring that [t]he . . . guidelines established pursuant to [§] 46b-215a and in effect on the date of the support determination *shall be considered in all determinations of child support amounts*" (emphasis in original; internal quotation marks omitted)); A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 38:19, pp. 310–11 ("consideration of the guidelines is mandatory in all child-support determinations"). The regulations governing child support broadly define a "child support

award" to mean "*the entire payment obligation of the noncustodial parent, as determined under the child support and arrearage guidelines*, and includes current support payments, health care coverage, child care contribution and periodic payments on arrearages." (Emphasis added.) Regs., Conn. State Agencies § 46b-215a-1 (6).

In the present case, the record shows that, in 2009, pursuant to the child support guidelines, Judge Gordon calculated the plaintiff's current support payments to be $528 per week. It also ordered the parties to share childcare expenses and unreimbursed medical and dental costs, in accordance with the percentage allocations contained in the child support guidelines, with the plaintiff to pay 72 percent of those costs. In accordance with § 46b-215b (a), there was "a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered." It is undisputed that, instead of awarding the presumptive amount calculated under the guidelines, Judge Gordon went further by ordering the plaintiff to pay 72 percent of the children's extracurricular activities. She therefore deviated from the presumptive amount of child support. As a result, Judge Gordon was required to make a specific finding on the record that the presumptive amount would be inequitable or inappropriate and to provide an explanation as to which deviation criteria the court was relying on to justify the deviation. See General Statutes § 46b-215b (a); Regs., Conn. State Agencies § 46b-215a-5c (a); *Righi* v. *Righi*, supra, 172 Conn. App. 436–37.[3] To the extent Judge

[3] Indeed, as the majority acknowledges, the preamble to the current child support and arrearage guidelines states that amounts ordered for extracurricular activities in excess of the presumptive child support amounts should be considered in accordance with the deviation criteria under the child support guidelines. See footnote 15 of the majority opinion; see also Child Support and Arrearage Guidelines (2015), preamble, § (j) (2), p. xxi; *Maturo* v. *Maturo*, supra, 296 Conn. 92–93 ("[t]he guidelines are accompanied by a preamble that is not part of the regulations but is intended to assist in their

Gordon did not make such a finding, the order is subject to modification under § 46b-86 (a).

Despite the clear language of § 46b-215b (a), our regulations, and our case law requiring that the child support guidelines be considered in all determinations of child support award amounts, the majority concludes that the court's award of costs for extracurricular activities in this case was issued as "a separate order, independent from the plaintiff's presumptive child support obligation, in accordance with § 46b-56." As a result, it concludes that the court had the authority to enter the order, which resulted in a child support award in excess of the presumptive child support amount, without considering or applying the deviation criteria set forth in the child support guidelines.

In support of its contention that the court had the discretion to make an award greater than the presumptive amount without reference to the deviation criteria set forth in the child support guidelines, the majority first notes that the presumptive amount of child support under the guidelines is intended only to cover the "basic" needs of a child. It further reasons that courts

interpretation"). In particular, under the section titled "Deviation criteria," the Commission for Child Support Guidelines states: "This commission considered adding extracurricular expenses to the currently listed [deviation] criteria of education expenses, unreimbursable medical expenses, and expenses for special needs. The commission decided not to add extracurricular expenses as a separate section under the category 'extraordinary expenses for care and maintenance of the child' *reasoning that extracurricular expenses could be addressed under the* [*deviation*] *criteria of best interests of the child under the 'special circumstances' heading*." (Emphasis added.) Child Support and Arrearage Guidelines, supra, p. xxi.

Although the 2005 child support guidelines are the operative guidelines for purposes of the extracurricular order in this case, the pertinent language of the two sets of guidelines is not materially different. Indeed, the commission itself acknowledged that the 2015 guidelines made minimal changes to the deviation criteria in the 2005 guidelines. See id., § (j) (1), p. xx ("[t]he commission determined that the deviation criteria are generally working well, and that minimal changes to the regulation were needed").

therefore have broad discretion under § 46b-56, independent of the child support guidelines and the deviation criteria set forth therein, to issue separate orders covering costs that exceed a child's "basic" needs. I respectfully disagree.

Section 46b-56 (a) provides in relevant part: "In any controversy before the Superior Court as to the custody or care of minor children, and at any time after the return day of any complaint under section 46b-45, the court may make or modify any *proper order* regarding the custody, care, education, visitation and support of the children if it has jurisdiction under the provisions of chapter 815p." (Emphasis added.) It is therefore clear that the statute gives courts the authority to make any "proper" order regarding the support of a child. In my view, an order regarding child support is not "proper" for purposes of § 46b-56 unless it complies with the more specific statutes and regulations governing child support awards, including the requirement in § 46b-215b (a) that the child support guidelines be considered in "all determinations of child support award amounts . . . ." That interpretation of § 46b-56 is consistent with "the well established principle of statutory interpretation that requires courts to apply the more specific statute relating to a particular subject matter in favor of the more general statute that otherwise might apply in the absence of the specific statute." (Internal quotation marks omitted.) *Studer* v. *Studer*, 320 Conn. 483, 497, 131 A.3d 240 (2016).

The majority's interpretation of § 46b-56, on the other hand, renders the mandates of § 46b-215b optional. Although the majority agrees that the court had the discretion to enter the same award amount in this case by applying the guidelines and ordering the plaintiff to pay the extracurricular costs as a deviation from the presumptive amount, the majority nevertheless concludes that § 46b-56 gave the court the broad authority

to do the same thing without reference to the guidelines. That interpretation is not only inconsistent with the plain language of § 46b-56, which requires courts to enter "proper" child support orders, and the requirement that we apply the more specific statute relating to a particular subject matter, but it is also at odds with the tenet of statutory construction requiring us to interpret statutes in such a way as to harmonize them in order to avoid an interpretation that would render a statutory requirement a nullity. See, e.g., *Dodd* v. *Middlesex Mutual Assurance Co.*, 242 Conn. 375, 388, 698 A.2d 859 (1997) ("[r]ather than adopt [a] reading of [the operative] statutory and regulatory provisions to create a genuine conflict that would result in a nullification of one by the other, as a reviewing court we should seek to harmonize the legislation so as to avoid conflict").

I also find unpersuasive the majority's reliance on this court's decision in *Powers* v. *Hiranandani*, 197 Conn. App. 384, 232 A.3d 116 (2020). In that case, this court merely cited to § 46b-56 in support of its conclusion that the trial court did not abuse its discretion when it ordered the father to pay a percentage of the children's extracurricular activities. Id., 405–406. The parties in that appeal, however, did not raise, and the court therefore did not address, the issue of whether an order requiring a parent to pay expenses for extracurricular activities in an amount that exceeds the presumptive amount of child support constitutes a deviation under the child support guidelines that requires the court to make a specific finding that awarding the presumptive amount would be inequitable or inappropriate. Indeed, there was no discussion at all in that opinion about § 46b-215b (a) or the child support guidelines.

Although it appears that our appellate courts have not previously addressed how costs for extracurricular activities are to be treated under the child support

guidelines, numerous judges in the Superior Court have correctly concluded that amounts ordered in excess of the presumptive child support amounts, including costs for extracurricular activities, must be tied to an appropriate deviation criteria under the child support guidelines with a specific finding that the presumptive amounts calculated under the guidelines would be inequitable or inappropriate. See, e.g., *Spizzirri* v. *Spizzirri*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-11-4021190-S (March 26, 2018); *Hernandez* v. *Rivera*, Superior Court, judicial district of Ansonia-Milford, Docket No. FA-17-6022444-S (July 18, 2017); *Rogers* v. *Rogers*, Superior Court, judicial district of Litchfield, Docket No. FA-10-4009253-S (May 18, 2017); *Soto* v. *Huth*, Superior Court, judicial district of Hartford, Docket No. FA-15-4077880-S (November 23, 2016); *Skiendziel* v. *Skiendziel*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-09-4017302-S (October 6, 2014); *Rice* v. *Rice*, Superior Court, judicial district of New Haven, Docket No. FA-02-0281393-S (January 24, 2013); *Allgrove* v. *Hodges*, Superior Court, judicial district of Hartford, Docket No. FA-03-0732608-S (September 16, 2005).[4]

[4] Other jurisdictions with similar child support laws and regulations also have concluded that an order requiring a noncustodial parent to pay amounts for extracurricular activities exceeding the amount of a presumptive child support award constitutes a deviation that must be justified by specific findings that the presumptive award would be inappropriate or inequitable. See, e.g., *Lehr* v. *Lehr*, 720 So. 2d 412, 415 (La. App. 1998) ("[b]ecause we find no evidence supporting a deviation from the child support guidelines or evidence indicating a particular educational need of [the children], we vacate that portion of the judgment ordering [the plaintiff] to pay [two thirds] of the costs of the children's participation in extracurricular activities"); *Elrom* v. *Elrom*, 439 N.J. Super. 424, 442, 110 A.3d 69 (App. Div. 2015) ("[T]he trial judge did not explain why she deviated from the [g]uidelines by adding . . . extracurricular activity costs as supplemental support. Reviewing the record we find [the] plaintiff's assertions of need were not evidentially supported; they merely reflect her opinion. Such testimony fails to establish the 'good cause' necessary for disregarding the [g]uidelines provisions."); *Sinnott* v. *Sinnott*, 194 App. Div. 3d 868, 877, 149 N.Y.S.3d 441 (2021) ("[T]he expenses of leisure, extracurricular and enrichment activities,

Although the majority points to other Appellate Court decisions in which trial courts awarded costs for extracurricular activities in amounts that resulted in awards that exceeded the presumptive amount under the guidelines, the majority concedes that the propriety of the extracurricular orders in those cases was not at issue. See footnote 16 of the majority opinion. Indeed, it is not even possible to know from reading those decisions whether the courts in those cases did (or did not) apply the guidelines and make the requisite findings on the record when awarding costs for extracurricular activities. See *Righi* v. *Righi*, supra, 172 Conn. App. 441 ("in order to deviate properly from the child support guidelines in fashioning a child support order, the court must fulfill each of the statutory requirements for deviation from the guidelines and that obligation includes a specific finding *on the record* that application of the guidelines would be inequitable or inappropriate given the circumstances of the case" (emphasis added)).

I am concerned that the majority's holding today will permit courts to do an end run around § 46b-215b (a) and the child support guidelines by issuing "separate orders" for amounts over and above the presumptive amounts without reference to the deviation criteria set

such as after-school clubs, sporting activities, etc., are usually not awarded separately, but are encompassed within the basic child support award . . . . A court can order a parent to pay these expenses over and above basic child support . . . . However, if it does so, it is a deviation from the basic statutory formula and requires an analysis under the factors set forth [by law]." (Citations omitted; internal quotation marks omitted.)); *Fox* v. *Fox*, 515 P.3d 481, 489–90 (Utah App. 2022) ("[S]chool fees and extracurricular activities are presumed to be included in the regular child support payment . . . . [A] court [however] can deviate from the presumptive child support guidelines and order a higher amount designed to include [school fees or costs for extracurricular activities] but such an order must be supported by a specific finding on the record supporting the conclusion that use of the guidelines would be unjust, inappropriate, or not in the best interest of the children . . . ." (Internal quotation marks omitted.)), cert. denied, 525 P.3d 1263 (Utah 2022).

forth in the guidelines. See *Maturo* v. *Maturo*, supra, 296 Conn. 100 ("[t]he deviation criteria are narrowly defined and require the court to make a finding on the record as to why the guidelines are inequitable or inappropriate"). Such a result runs counter to the clear purpose of § 46b-215b and the child support guidelines, which is "to ensure that [child support awards] promote 'equity,' 'uniformity,' and 'consistency,' " for all children. Id., 94–95.

To be clear, I do not conclude that trial courts cannot order a parent to pay the costs of extracurricular activities in an amount that exceeds the presumptive amount of child support under the guidelines. Rather, in order to do so, a court must simply comply with § 46b-215b (a), which requires a specific finding on the record that an award of the presumptive amount under the guidelines would be inequitable or inappropriate and an explanation as to which deviation criteria under the guidelines justify deviation from the presumptively correct amounts.[5] See Regs., Conn. State Agencies § 46b-215a-5c (a); *Righi* v. *Righi*, supra, 172 Conn. App. 436–37.

Because I conclude that the child support guidelines were applicable to the extracurricular order in this case, I also conclude that a trial court would be permitted to modify that order pursuant to the substantial deviation ground under § 46b-86 (a) if that ground was properly raised in a motion for modification and if there was a substantial deviation from the child support guidelines without the requisite findings.

Accordingly, I concur.

[5] For example, this court has explained that "an agreement of the parties may be sufficient to rebut the presumption that the support amount calculated under the guidelines is the correct amount; however, the court must still make such a finding, cite one or more deviation criteria to support the agreement, state the amount that would have been required under such sections and make a factual finding to justify the variance." *Deshpande* v. *Deshpande*, 142 Conn. App. 471, 478, 65 A.3d 12 (2013).

JASON A. ROMAN *v.* COMMISSIONER OF CORRECTION (AC 45971)

Cradle, Suarez and Flynn, Js.

Syllabus

The petitioner, who had been convicted of assault of public safety personnel and who had been found to be a persistent felony offender, sought a writ of habeas corpus, claiming that his trial counsel, I, and his counsel on direct appeal, R, each rendered ineffective assistance. The habeas court denied the petition, and, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The habeas court did not err in concluding that I did not provide ineffective assistance:

a. This court declined to review the petitioner's claims that I failed to investigate mitigation during the plea negotiation process regarding the petitioner's mental health, that he failed to investigate and prepare a defense regarding the petitioner's mental state at the time of the offense, and that he failed to present mitigation at sentencing, those claims having been inadequately briefed; the claims consisted of bare allegations of deficient performance and failed to assert any specific error as to the habeas court's findings of facts or its application of facts to the law and, thus, were deemed to be abandoned.

b. The petitioner could not prevail on his claim that I failed to advise him appropriately about the offenses charged, the elements of those offenses, the risk of exposure, and the likelihood of success at trial: the petitioner's claim was inadequately briefed because he failed to assert any specific claim of error by the habeas court; moreover, even if this court were to interpret the petitioner's argument as an implied challenge to the habeas court's findings, in making that argument the petitioner relied on portions of his testimony that the habeas court determined not to be credible, and it was not this court's role to reweigh the evidenced adduced at the habeas trial; furthermore, the one specific claim of error that the petitioner asserted within this portion of his argument, namely, that the habeas court's finding that credited I's testimony that there was no breakdown in communication or in the attorney-client relationship was clearly erroneous in light of the fact that the petitioner sought to remove I as counsel immediately before the trial, failed because, as the sole arbiter of the credibility of witnesses, the habeas court was free to believe I's testimony.

c. The petitioner's claim that I's representation was deficient as it related to the plea offer was unavailing: even if this court were to broadly construe the petitioner's claim as challenging the habeas court's conclusion that the petitioner failed to prove deficient performance by I, the

habeas court credited I's testimony that the petitioner considered the plea offer but did not want to accept it, and there was ample evidence in the record demonstrating that the petitioner had opportunities to accept a plea agreement yet affirmatively declined to do so; accordingly, it was reasonable for I to defer to the petitioner's decision to go to trial.

d. The habeas court properly found that the petitioner did not establish that I performed deficiently by failing to request a more specific jury instruction regarding the scope of law enforcement's performance of duties; the trial court's instruction satisfied the requirements set forth in *State* v. *Davis* (261 Conn. 553) and *State* v. *Baptiste* (133 Conn. App. 614), as the court's detailed instruction provided that the state was required to establish that the police officer had been acting in the performance of his duties and included an instruction regarding reasonable force.

e. The petitioner could not prevail on his claims that I provided ineffective assistance by failing to request a continuance of the trial on the part B information, which related to the charge of being a persistent felony offender, and by failing to request a competency evaluation: the habeas court credited I's testimony, which it was entitled to do, that the petitioner was able to engage in the part B trial and understood what the findings were going to be, that I believed that a competency evaluation could negatively impact the petitioner if it indicated that the petitioner was choosing not to assist counsel, and that I did not request a continuance to avoid the adverse consequence of anyone believing that the petitioner was trying to delay the inevitable; moreover, the petitioner did not meet his burden of overcoming the strong presumption that I's trial strategy was reasonable.

2. The habeas court properly rejected the petitioner's ineffective assistance claim as to R with respect to his failure to present a claim regarding the petitioner's mental state and competency on direct appeal: the petitioner did not call R to testify at the habeas trial to explain why he did not present arguments regarding the petitioner's mental health and competence on direct appeal and did not offer any other evidence of R's reasons for choosing which claims to raise on direct appeal; moreover, the petitioner did not cite to any legal authority in support of his claim that R's testimony at the habeas trial was unnecessary because R had acknowledged at an earlier habeas hearing, when he was representing the petitioner, that his conflict in representing the petitioner both on direct appeal and at the habeas trial would preclude him from raising the claim that the issue of the petitioner's mental health could have been raised on direct appeal, nor did the petitioner provide any legal analysis as to what the claim would have entailed or how it would have affected the result of his appeal; accordingly, the petitioner did not meet his burden of overcoming the strong presumption that R exercised reasonable professional judgment.

Argued September 20—officially released December 26, 2023

Procedural History

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

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

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, *Angela R. Macchiarulo*, supervisory assistant state's attorney, *Michael J. Proto*, senior assistant state's attorney, and *Sarah Hanna*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Jason A. Roman, 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. The petitioner contends that the habeas court improperly rejected his claims of ineffective assistance on the part of both his criminal trial counsel and his appellate counsel. We affirm the judgment of the habeas court.

The following facts, as set forth by the habeas court, and procedural history are relevant to the petitioner's claims on appeal. "The petitioner was charged with assault [of] public safety [personnel] in violation of General Statutes § 53a-167c (a) (1).[1] In a separate part B information, the petitioner was also charged with being a persistent felony offender in violation of General

[1] Although § 53a-167c (a) has been amended since the time of the underlying incident; see Public Acts 2019, No. 19-108, § 8; Public Acts 2015, No. 15-211, § 15; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53a-167c.

Statutes § 53a-40 (g) and (o).[2] The underlying charges arose from an incident on May 2, 2014, the facts of which are not in dispute. New Britain police officers were dispatched to a reported potential domestic incident or protective order violation. When the police officers arrived at [the site of the incident], the petitioner and his mother . . . were in a white Toyota parked near the front of [the site]. A police officer investigating the reported dispute or violation went to the vehicle and asked [the petitioner] for his motor vehicle operator's license. [The petitioner] was also asked to turn off the car engine. [The petitioner] gave the police officer his driver's license and the police officer returned to his vehicle to contact dispatch to ascertain if there were any outstanding warrants at that time. [The petitioner's] mother exited the vehicle at some point and sat on the sidewalk nearby. The police determined that [the petitioner] was not involved in the reported domestic dispute or protective order violation; however, the police were informed that there was a paperless arrest warrant for [the petitioner]. A police officer approached the vehicle and asked [the petitioner] to step out of the vehicle. [The petitioner] started the engine, which resulted in the police officer reaching inside the vehicle in an attempt to turn off the ignition. Police officers yelled 'stop' repeatedly but [the petitioner] drove off and the police officer was pulled along for about thirty to forty feet before he was able to free himself. [The petitioner] was subsequently arrested and charged." (Footnotes added.)

[2] We note that, between the time of the underlying incident in 2014 and the filing of the part B information in 2017, subsections (f) and (m) of General Statutes (Rev. to 2013) § 53a-40 were redesignated as subsections (g) and (o), respectively. Public Acts, Spec. Sess., June, 2015, No. 15-2, § 19. Although § 53a-40 (g) has been amended since the time of the filing of the part B information; see Public Acts 2021, No. 21-102, § 10; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

The petitioner was first represented by Attorney James Hardy, who entered an appearance at the petitioner's arraignment on August 26, 2014. On April 29, 2015, the petitioner indicated on the record his intention to replace Hardy with new counsel.

After the court granted the petitioner multiple continuances to secure new counsel, Attorney William Gerace filed an appearance in lieu of Hardy's appearance on July 20, 2015. On November 17, 2015, the petitioner was presented with a plea offer of six years of incarceration followed by four years of special parole, with the right to argue for a lesser sentence. After the court explained the offer, including the potential repercussions of going to trial, and gave the petitioner time to consider the offer, the petitioner entered not guilty pleas and elected a trial by jury.

On September 27, 2016, Gerace moved to withdraw his appearance on the basis that the petitioner had not responded to him or met with him. During a court appearance on October 17, 2016, the petitioner stated that he did not "trust [Gerace] enough to go to trial with him," and the court granted Gerace's motion to withdraw his appearance. On the same day, the court appointed Michael Isko, a public defender, to represent the petitioner. On April 24, 2017, a hearing was held to determine the status of the petitioner's case and to schedule a date for trial to commence. At the hearing, the petitioner was asked by the court whether he wanted a trial to a jury, to a court, or whether he wanted to resolve his case by way of a plea agreement. The petitioner was presented with a new plea offer of four years of incarceration. Isko represented that, if the petitioner were to decide to go to trial, he intended to proceed with a jury trial. The petitioner then asked for a continuance "to be able to speak to his family about the new offer." The court, *Alexander*, *J.*, gave him until April 26, 2017, to accept the offer or to reject it and

begin jury selection. On April 26, 2017, the petitioner appeared before Judge Alexander because he "indicated that [he] had some things [he] wanted to say on the record . . . ." The petitioner asked to replace Isko with a special public defender, alleging that Isko was ineffective for not moving forward with a medical expert and not investigating the side effects of a medication he was taking at the time of the incident. The court informed the petitioner that he could seek new counsel but declined to continue the case further. Isko clarified that he had the petitioner's "[medical and mental health] records from 2014, when this incident occurred," and stated that he would receive additional records before the start of evidence. To address the petitioner's concerns, the court requested that Isko "make sure . . . [t]hat those records [would] be available [and] . . . analyzed for entry, as [the petitioner] want[ed] that as part of his defense . . . ." Jury selection commenced that day with Isko representing the petitioner.

During jury selection, the court, *Keegan, J.*, explained that the part B information "enhances the penalty if [the petitioner were] convicted for the underlying offense" to a "twenty year felony instead of a ten year felony . . . ." Isko confirmed that, even though he "[had not received] the part B [information] until [that] morning," he had "advised [the petitioner] of the potential of the part B [information] in that effect." The petitioner addressed the court to indicate that he was aware of the part B information and understood its potential consequences.

Trial commenced on May 1, 2017, with Judge Keegan presiding. On May 2, 2017, before the commencement of the second day of trial, the petitioner appeared before Judge Alexander who confirmed that Isko had received the additional records discussed on April 26, 2017, and that Isko had been able to present testimony in the petitioner's defense. Judge Alexander also informed the

petitioner that it would be his decision whether to proceed with a jury trial or a bench trial if the part B information were to "[become] an issue . . . ." Isko stated that he had "not discussed that with [the petitioner] as of yet." Trial continued, and the jury subsequently found the petitioner guilty of assault of public safety personnel. Following the jury's verdict, Isko indicated to the court, *Keegan*, *J.*, that he had not yet spoken with the petitioner about whether he wanted to have a bench trial or a jury trial on the part B information and asked for a short recess in order to do so. Thereafter, during a canvass by a different judge, the court, *D'Addabbo*, *J.*, declined to allow the petitioner to waive his right to a jury trial, finding that "[the petitioner was] not understanding what [he was] doing."[3]

The same day, the petitioner appeared again before Judge Keegan and a jury trial commenced on the part B information. The jury found the petitioner guilty of being a persistent felony offender and the court

[3] The following colloquy between Judge D'Addabbo and the petitioner transpired during the canvass:

"The Court: Okay. Does the medication [you take] in any way affect your ability to think?

"[The Petitioner]: At times, yes.

"The Court: Is it affecting your ability to think today?

"[The Petitioner]: I can't really determine that just for the simple fact of my emotional state at this point . . . .

"The Court: Do you understand what's going on today?

"[The Petitioner]: In a sense, yes.

"The Court: Okay. All right. Is anyone forcing you or threatening you in any way to change your election from a jury trial to a court trial?

"[The Petitioner]: I thought we already had the trial. . . .

"The Court: So, you understand what's going on here today?

"[The Petitioner]: Again, my emotions and my anxiety are kicking in right now. It's like I'm everywhere right now, you know? I'm sorry. . . . I really don't understand.

"The Court: Okay. Very well. We'll have a jury trial then. He doesn't understand. . . . He can't make it through a canvass and as a result we can't have a waiver of his right to a jury trial if he's not understanding what he's doing."

accepted the verdict. Thereafter, the court ordered a presentence investigation report and scheduled a date for sentencing. On July 7, 2017, the court, *Keegan*, *J.*, conducted a sentencing hearing in which the petitioner received a total effective sentence of twelve years of incarceration.[4]

Represented by Attorney David Reich, the petitioner appealed from the judgment of the trial court, which this court affirmed. *State* v. *Roman*, 187 Conn. App. 903, 200 A.3d 226, cert. denied, 331 Conn. 931, 208 A.3d 279 (2019).

On July 29, 2021, the petitioner filed his sixth amended petition for a writ of habeas corpus, alleging eight counts of ineffective assistance as to Isko and one count of ineffective assistance as to Reich.[5] At the habeas trial on March 1 and April 7, 2022, the petitioner, through counsel, offered into evidence his medical records and presented the testimony of three witnesses:

[4] In September, 2022, the court, *Keegan*, *J.*, reduced the petitioner's sentence from twelve to ten years of incarceration.

[5] In that petition, the petitioner claimed that Isko was ineffective (1) because of a "breakdown in the attorney-client relationship which resulted in a lack of clear communication, including communication regarding the offenses charged, the elements of those offenses, the petitioner's risk of exposure at trial, the evidence against the petitioner, and the likelihood of success at trial"; (2) in failing "to meaningfully convey a plea offer to the petitioner and ensure [that] the petitioner had an opportunity to accept or reject that offer on the record"; (3) in failing "to investigate or present appropriate mitigation during the plea negotiation process"; (4) in failing "to investigate or prepare a defense regarding the petitioner's mental state at the time of the offense"; (5) in failing "to investigate or prepare and present mitigation at the petitioner's sentencing"; (6) in failing "to effectively request a jury instruction . . . on the scope of law enforcement's performance of duties and ensure the issue was appropriately preserved for appeal"; (7) in failing "to request a continuance prior to the part B trial given the petitioner's mental state at the time"; and (8) in failing "to request a competency evaluation prior to the part B trial given the petitioner's mental state at the time." The petitioner's claim against Reich at the habeas trial alleged that Reich was ineffective in failing "to raise a claim on appeal regarding the petitioner's mental state at the time of trial."

Isko, a mitigation specialist, and himself. The petitioner did not call Reich, his direct appellate counsel, to testify. On August 23, 2022, the habeas court, *M. Murphy*, *J.*, issued a memorandum of decision in which it concluded that the petitioner had failed to prove that Isko and Reich had provided ineffective assistance and denied his petition for a writ of habeas corpus.[6] The habeas court thereafter granted certification to appeal, and this appeal followed. Additional facts and procedural history will be provided as necessary.

We begin by setting forth the standard of review and the following relevant legal principles. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Lance W.* v. *Commissioner of Correction*, 204 Conn. App. 346, 354, 251 A.3d 619, cert. denied, 337 Conn. 902, 252 A.3d 363 (2021). "[T]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . Thus, the court's factual findings are entitled to great weight. . . . Furthermore, [a] finding of fact is clearly erroneous when

[6] The habeas court made findings, as to each of the petitioner's claims, that he had failed to prove that counsel's performance was deficient. The court made clear findings under the prejudice prong of the test established in *Strickland* v. *Washington*, 466 U.S. 648, 687, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), only as to some of the petitioner's claims.

there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Collins* v. *Commissioner of Correction*, 202 Conn. App. 789, 812, 246 A.3d 1047, cert. denied, 336 Conn. 931, 248 A.3d 1 (2021). On the other hand, "[t]he application of the habeas court's factual findings to the pertinent legal standard . . . presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 537, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [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." (Internal quotation marks omitted.) *Lance W.* v. *Commissioner of Correction*, supra, 204 Conn. App. 354–55. "[J]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 215–16, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

"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. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Lance W.* v. *Commissioner of Correction*, supra, 204 Conn. App. 355.

Finally, "[w]e repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing

the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 611, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021). "[When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021).

On appeal, the petitioner essentially sets forth the same allegations of ineffective assistance of counsel as he did before the habeas court. He claims that Isko failed (1) to advise him appropriately about the offenses charged, the elements of those offenses, the risk of exposure, and the likelihood of success at trial; (2) to advise him appropriately about the benefits of accepting the plea offer and ensure that he had an opportunity to accept or reject the plea offer on the record; (3) to investigate mitigation during the plea negotiation process regarding the petitioner's mental health; (4) to investigate and prepare a defense regarding the petitioner's mental state at the time of the offense; (5) to present mitigation at sentencing; (6) to request a more specific jury instruction on the scope of law enforcement's performance of duties; (7) to request a continuance on the part B trial; and (8) to request a competency evaluation. The petitioner also claims that the habeas court erred in finding that he failed to demonstrate ineffective assistance of his direct appellate counsel, Reich, because Reich failed to present a claim regarding the petitioner's mental state and competency on direct appeal.

We need not address all of the petitioner's numerous claims. Because the petitioner has failed to adequately brief claims three, four, and five as to Isko, we deem those claims abandoned and decline to review them.

See id. With regard to claims three, four and five, the petitioner frames his arguments in a manner that asks this court to find that there had been ineffective assistance of trial counsel, although he neglects to allege any error on the part of the habeas court. It is well established that this court may not review a claim of ineffective assistance of counsel in the absence of claimed error on the part of the habeas court. *Artiaco* v. *Commissioner of Correction*, 180 Conn. App. 243, 249–50, 182 A.3d 1208 (holding that petitioner's claims were indiscernible and, therefore, unreviewable when he "fail[ed] to identify which of the habeas court's determinations he [was] challenging"), cert. denied, 328 Conn. 931, 184 A.3d 758 (2018). Although this court may reframe poorly framed claims consistent with the manner in which they are analyzed in an appellate brief; see *Doe* v. *Quinnipiac University*, 218 Conn. App. 170, 173 n.4, 291 A.3d 153 (2023) (reframing "the claims in this appeal to more accurately reflect the arguments set forth in the body of the plaintiff's brief"); the petitioner's analysis of these claims in his brief is consistent with the manner in which they are framed. His arguments consist of bare allegations of deficient performance without challenging the factual or legal grounds on which the court relied in rejecting the allegations. The petitioner in claims three, four and five has failed to assert specific error as to the habeas court's findings of fact or its application of facts to the law. Resultantly, these claims are inadequately briefed and we decline to review them.[7] See *Cohen* v. *Rossi*, 346 Conn. 642,

[7] Even if we were to liberally construe these as implicit claims that the habeas court's findings were erroneous, the petitioner's arguments are unavailing. He relies almost exclusively on evidence that he proffered at the habeas trial, which the habeas court explicitly discredited or found unpersuasive. It is axiomatic that the fact finder is free to accept or reject any of the evidence it chooses, and it is not the role of this court to reassess or reweigh that evidence. See *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 367–68, 273 A.3d 680 (2022) ("The court reiterate[d] the well settled principle that [an appellate court] must defer to the finder of fact's evaluation of the credibility of the witnesses that is based on its invaluable

689, 295 A.3d 75 (2023) (declining to review briefed claims that "[left our Supreme Court] unable to ascertain exactly what alleged error the [petitioner was] claiming").

Although the petitioner's remaining claims of ineffective assistance of counsel suffer from the same infirmities as those set forth in the preceding paragraph, we can identify within them a few specific claims of error. We therefore address the petitioner's remaining claims in turn.[8]

I

We first address the petitioner's claim that the habeas court erred in concluding that Isko did not provide ineffective assistance.

A

The petitioner first claims that Isko failed to advise him appropriately about the offenses charged, the elements of those offenses, the risk of exposure, and the likelihood of success at trial. We are not persuaded.

firsthand observation of their conduct, demeanor and attitude. . . . [The fact finder] is free to juxtapose conflicting versions of events and [to] determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.)). Accordingly, the petitioner cannot prevail on these claims.

[8] With reference to the manner in which we previously have numbered the petitioner's claims on appeal, we note that the petitioner's remaining claims include his claims that Isko failed (1) to advise him appropriately about the offenses charged, the elements of those offenses, the risk of exposure, and the likelihood of success at trial, (2) to advise him appropriately about the benefits of accepting the plea offer and ensuring that he had an opportunity to accept or reject the plea offer on the record, (6) to request a more specific jury instruction on the scope of law enforcement's performance of duties, (7) to request a continuance on the part B trial, and (8) to request a competency evaluation, and, finally, his claim that Reich failed to present a claim regarding the petitioner's mental state and competency on direct appeal.

In addressing this claim, the habeas court found that "Isko met with [the petitioner] at length to discuss the trial and his vulnerabilities at trial. Isko described [the petitioner] as being resistant to his assessment of the chances of prevailing at trial. Nevertheless, Isko made an extra effort to explain to [the petitioner] the trial and how different issues would likely play out. . . . Isko never thought that there was a breakdown in communications between him and [the petitioner]. Isko had discussions with [the petitioner], who he described as being able to freely and easily communicate with him, took his time to carefully listen and understand [the petitioner's] concerns, and adapted [the petitioner's] view of the case as the trial strategy. . . . Isko described [the petitioner] as attentive and concerned about the trial." The habeas court also found that "Isko discussed the part B information at length with [the petitioner]. The transcripts from the underlying criminal proceedings reflect that the part B information issue arose regularly and [the petitioner] acknowledged that he understood the courts' explanations about the part B information." Even though "Isko acknowledged that . . . [the petitioner] was anxious . . . about the guilty verdict" and the petitioner "was unable to complete the court's canvass to determine if he could waive the jury trial on the part B information . . . Isko described [the petitioner] as being able to communicate with him. Isko again explained the part B process and jury waiver to [the petitioner] . . . ." According to the habeas court, "Isko described [the petitioner] as being able to make his feelings known to Isko and as being able to assist his counsel. Isko confirmed that he discussed with [the petitioner] the charged offense, its elements, what the state would need to prove, the evidence the state intended to present, and the strength of the evidence." The habeas court recounted that the petitioner testified that he "did not approve of Isko and did not feel like

talking with him because he was abrasive. [The petitioner] felt that Isko did not adequately explain the evidence against him . . . [and the petitioner] did not understand the part B process." The habeas court credited Isko's testimony over the testimony of the petitioner and held that "[t]his basis for ineffective assistance [of counsel] is denied because there is no credible evidence of deficient performance."

As in other areas of his brief, the petitioner's argument that Isko failed to advise him appropriately about the offenses charged, the elements of those offenses, the risk of exposure, and the likelihood of success at trial cannot be entertained by this court without a claim that the habeas court was clearly erroneous as to one of its specific findings or determinations. Moreover, the petitioner again references portions of his testimony in support of this argument and ignores the habeas court's related credibility determinations. In the absence of any specific claim of error by the habeas court, the petitioner's claim is inadequately briefed. See *Cohen* v. *Rossi*, supra, 346 Conn. 689. Even if we were to liberally interpret his argument as an implied challenge to the habeas court's findings, it is not our role to reweigh the evidence adduced at the habeas trial.

The petitioner's one specific claim of error within this portion of his argument fails for the same reason. He claims that "[t]he habeas court's finding that credited [Isko's] testimony that there was no breakdown in communication or the attorney-client relationship is clearly erroneous in light of the fact that the petitioner sought to remove him as counsel immediately before trial." Because the habeas court is the sole arbiter of the credibility of witnesses; see *Collins* v. *Commissioner of Correction*, supra, 202 Conn. App. 812; it is entitled to this court's deference as to which party's testimony to credit. Thus, the habeas court was free to believe that "Isko never thought that there was a breakdown

in communications . . . .'' Accordingly, the petitioner's claim fails.

B

The petitioner next argues that Isko's representation of him was deficient as it related to the plea offer. As to this claim, the habeas court found that ''Isko described [the petitioner] as being persistent about his decision to take the case to trial and not plead guilty. [The petitioner] neither accepted the initial court indicated sentence nor the modified offer. Isko testified that [the petitioner] considered the offer but did not want to accept it.'' The habeas court determined that ''[t]he credible evidence presented by Isko leads . . . to the conclusion that [the petitioner] wanted a jury trial instead of resolving the matter with a plea agreement'' and that the petitioner had ''failed to prove deficient performance by Isko.''

The petitioner argues that ''[t]he habeas court erred in finding there was no deficient performance because there is no reason the petitioner was never presented to the court to accept or reject the [plea] offer. The habeas court's finding that [Isko] presented credible evidence that the petitioner wanted a jury trial instead of a [guilty] plea was clearly erroneous. Not only did the petitioner testify unequivocally [that] he wanted the plea offer, but the trial transcripts make clear that the petitioner required time to consider the offer, as evidence[d] by the continuance allowing him to do so.''

Even if we were to broadly construe this claim challenging the habeas court's conclusion that the petitioner failed to prove deficient performance by Isko, we are not persuaded. The habeas court credited Isko's testimony that the petitioner ''considered the [plea] offer but did not want to accept it.'' See *Collins* v. *Commissioner of Correction*, supra, 202 Conn. App. 812. Moreover, there is ample evidence in the record that the

petitioner had opportunities to accept a plea agreement yet affirmatively declined to do so. Consistent with well established principles, it was reasonable for Isko to defer to his client's decision to go to trial. See *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 463, 298 A.3d 588 (2023) (explaining that, although defense counsel "must give the client the benefit of counsel's professional advice on this crucial decision of whether to plead guilty . . . the ultimate decision whether to plead guilty must be made by the defendant" (internal quotation marks omitted)). We, therefore, find the petitioner's claim unavailing.

C

The petitioner next claims that Isko rendered deficient performance "in failing to request a more specific jury instruction on the scope of law enforcement's performance of duties." The habeas court rejected this claim, finding that "[t]he trial court's jury charge . . . described all the elements of assault of public safety personnel with sufficient detail" and that the petitioner "ha[d] not established that the instruction given failed to properly guide the jury given the facts established at the criminal trial." Although the petitioner, again, fails to claim specific error on the part of the habeas court, we review this claim because it essentially challenges a legal determination of the habeas court as to the sufficiency of the jury instruction.

The following additional procedural history is relevant to this claim. At trial on May 2, 2017, the court, *Keegan*, *J.*, instructed the jury on the elements of the charge of assault of public safety personnel.[9] The petitioner challenged the sufficiency of this jury instruction

[9] The jury instructions provided in relevant part: "The second element is that the conduct of the [petitioner] occurred while [the officer] was acting in the performance of his duties. The phrase 'in the performance of his duties' means that the . . . police officer was acting within the scope of what he is employed to do and that his conduct was related to his official duties. The question of whether he was acting in good faith in the perfor-

on direct appeal, arguing that the court should have instructed the jury "that it needed to weigh whether the use of force was necessary considering [the officer's] own safety and that of the general public. . . . [The] instruction does not relay to the jury what factors the court should use in determining how to determine whether the use of force was reasonable." (Citation omitted.) This court affirmed the trial court's judgment without elaboration. *State* v. *Roman*, supra, 187 Conn. App. 903.

With regard to jury instructions addressing the second element of § 53a-167c (a) (1), our Supreme Court has held that a trial court must provide "a detailed instruction that the state must establish that the police officer had been acting in the performance of his duty and that a person is not required to submit to the unlawful use of physical force during the course of an arrest . . . ." *State* v. *Davis*, 261 Conn. 553, 571, 804 A.2d 781 (2002). This court further held that, "[b]ecause reasonable force is an inherent component of the performance of an officer's duties . . . an instruction regarding reasonable force is required to comply with the

mance of his duties is a factual question for you to determine on the basis of the evidence in this case.

"In determining whether the officer was acting in the performance of his duties, you must consider another provision in our law that justifies the use of physical force by officers in making an arrest or preventing an escape. That statute provides that an officer is justified in using physical force upon another person when and to the extent that he reasonably believes such to be necessary to effect an arrest or prevent an escape from custody of a person whom he reasonably believes to have committed an offense, unless he knows that the arrest or custody is unauthorized. An officer's use of force to effect the arrest or prevent the escape from custody is justified only so far as he reasonably believes that a person has committed an offense. . . .

"If the reasonably believed facts or circumstances would not in law constitute an offense . . . the officer would not be justified in the use of physical force to make an arrest or prevent an escape from custody. . . .

"If you find that the force used by the officer was not reasonable, you will find that [the officer] was not acting within the performance of his official duties while attempting to arrest or prevent the escape of the [petitioner]."

standard set forth in *Davis*." *State* v. *Baptiste*, 133 Conn. App. 614, 627, 36 A.3d 697 (2012), appeal dismissed, 310 Conn. 790, 83 A.3d 591 (2014).

In the present case, the trial court's jury instruction satisfies the requirements set forth in *Davis* and *Baptiste* because the court provided a detailed instruction that the state must establish that the police officer had been acting in the performance of his duties, including an instruction regarding reasonable force. Although this court declined to comment on this jury instruction in the petitioner's direct appeal; see *State* v. *Roman*, 187 Conn. App. 903; it did analyze an almost identical jury instruction in *State* v. *Nelson*, 144 Conn. App. 678, 694–95, 73 A.3d 811, cert. denied, 310 Conn. 935, 79 A.3d 888 (2013).[10] In *Nelson*, this court concluded, on the basis of a review of the entire charge, that "the court's jury instructions properly framed the issues and thus, sufficiently protected the defendant's rights to due process." Id., 695. On the basis of the foregoing, the habeas court properly found that the petitioner did not establish that Isko performed deficiently by failing to request a more specific charge.

D

Finally, as to Isko, the petitioner claims that Isko provided ineffective assistance by failing to request a continuance of the trial on the part B information and, furthermore, by failing to request a competency evaluation. The habeas court addressed these claims together,

[10] In contrast to the present case, the defendant in *Nelson* had been convicted of interfering with an officer under General Statutes (Rev. to 2007) § 53a-167a. *State* v. *Nelson*, supra, 144 Conn. App. 680. This court's conclusion related to the jury instruction in *Nelson* is nonetheless applicable to the present case because General Statutes § 53a-167a (a) is a lesser included offense of § 53a-167c (a) (1); *State* v. *Flynn*, 14 Conn. App. 10, 17–18, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988); and the relevant holding in *Davis* applies to it. See *State* v. *Davis*, supra, 261 Conn. 571.

finding that "[the petitioner] acknowledge[d] that Isko did not think that a continuance would benefit him" but that "[the petitioner] glosse[d] over the fact that Isko never saw a basis for requesting a competency evaluation prior to the part B trial or at any other time he represented [the petitioner]." The habeas court ultimately concluded that "[the petitioner] ha[d] not shown that Isko rendered deficient performance for not requesting a continuance or requesting a competency evaluation prior to the part B trial, nor ha[d] [the petitioner] shown that he suffered any prejudice."

The petitioner argues that "[t]he habeas court's finding that [Isko] did not render deficient performance because he did not see a basis for a continuance was clearly erroneous in light of the circumstances. While a continuance may or may not have changed the ultimate outcome of the case, counsel nevertheless had an obligation to ensure the petitioner was competent for his criminal proceedings and that he had a rational, as well as factual, understanding. The record demonstrates unequivocally that the petitioner did not."[11] In fact, according to Isko's testimony, the petitioner, at the time

[11] The petitioner also contends that "[t]he habeas court's factual findings that neither [Isko], nor the petitioner's two prior attorneys, saw a basis for a competency evaluation is clearly erroneous in light of the record." He asserts that the "two prior attorneys ha[d] nothing to do with the . . . habeas claim against [Isko]," and "they . . . did not represent the petitioner at the operative time when a competency evaluation was necessary." As to this contention, however, the petitioner misconstrues the habeas court's finding. Within its analysis of the petitioner's claim that Isko should have investigated and raised a defense of mental disease or defect, the habeas court found that "[t]he petitioner ha[d] not presented any evidence that demonstrates that he could establish a defense such as extreme emotional disturbance or mental disease or defect. There is no evidence that *any* of the attorneys who represented [the petitioner]—Hardy, Gerace, and Isko—ever determined that such defenses were viable and supported." (Emphasis in original.) In other words, the habeas court never found that the petitioner's other attorneys saw no basis for a *competency evaluation*. Because the petitioner can challenge only a finding the habeas court actually made, this claim fails.

of the part B trial, "was able . . . to . . . engage. He understood what the findings were going to be. . . . [The petitioner] exhibited . . . very similar behavior as anyone who's just been found guilty would exhibit." Isko's testimony also reveals that he believed that a competency evaluation could negatively impact the petitioner, in case it were to show that the petitioner was "choosing not to" assist counsel. Isko testified that he did not request a continuance to avoid the similarly "adverse consequence of anyone believing [the petitioner] was trying to delay the inevitable." The habeas court credited Isko's testimony, and it was entitled to do so. Moreover, the petitioner has not met his burden of overcoming the strong presumption that Isko's trial strategy was reasonable. Accordingly, the petitioner's claims are unavailing.[12]

II

We now turn to the petitioner's claim that the habeas court erred in concluding that Reich, his appellate attorney on direct appeal, did not render ineffective assistance. In support of this claim, the petitioner argues

[12] The petitioner also challenges the habeas court's conclusion that he did not demonstrate that he suffered any prejudice due to Isko's failure to request a continuance or a competency evaluation. In two sentences, the petitioner alleges that he was presumed to be prejudiced by Isko's failure to request a continuance at the time of the commencement of the part B trial "because the adversarial process had broken down" pursuant to *United States* v. *Cronic*, 466 U.S. 648, 659–60, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Aside from providing the legal citation to *Cronic*, however, the petitioner has not set forth a legal or factual analysis in support of this argument. See *Robb* v. *Connecticut Board of Veterinary Medicine*, supra, 204 Conn. App. 611 (explaining that "[t]he parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited" (internal quotation marks omitted)). Moreover, the petitioner's acknowledgment that "a continuance may or may not have changed the ultimate outcome of the case" explicitly defeats any further argument that he was prejudiced by Isko's alleged failure to seek a continuance. See *Strickland* v. *Washington*, supra, 466 U.S. 696 (holding that "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors").

that Reich failed "to present a claim regarding the petitioner's mental state and competency on direct appeal" when "[t]here was no objectively reasonable basis . . . not to do so." We are not persuaded.

The following additional procedural history is relevant to this claim. When the petitioner filed his initial petition for a writ of habeas corpus, Reich was still his attorney. The fifth amended habeas petition, which Reich filed, alleged Isko's ineffective assistance for, inter alia, not pursuing mitigation or defenses related to the petitioner's mental health at trial. At a hearing on November 9, 2020, the parties discussed a potential conflict of interest in Reich's representation of the petitioner at the habeas trial because of his previous role as the petitioner's appellate counsel. The court, *Oliver*, *J.*, asked Reich if he thought "certain [habeas] claims may be foreclosed" if he continued to represent the petitioner. Reich replied that he did, "especially the due process claim that . . . could have been brought forth when [the petitioner] . . . was not quite in his right mind and not able to engage the court in the part B [trial] . . . ." As a result, the court, *Oliver*, *J.*, removed Reich as counsel, and the petitioner proceeded to the habeas trial with Attorney Judie Marshall, who filed a sixth amended petition on behalf of the petitioner, including a claim alleging that Reich was ineffective.

The habeas court, *M. Murphy*, *J.*, found that the petitioner presented no evidence of deficient performance or evidence that the outcome of the appeal would have been different but for any alleged deficiency. The court reasoned that, because Reich did not testify as to how he "selected issues to raise on appeal," the court "must presume . . . that Reich was reasonably competent as appellate counsel."

In this appeal before us, the petitioner makes only one cognizable appellate claim, that the habeas court's

legal analysis was improper, arguing that "[i]t is not necessary to know how [Reich] selected issues on appeal . . . . Rather, this court need only look to the fact that [Reich] did not raise the issue on appeal, but believed there was a basis for a claim based on mental health, which is demonstrated by the amended petition he filed."

The petitioner alleges that "[Reich's] testimony was unnecessary, especially because he, at the November 9, 2020 habeas hearing, [admitted] that there was a due process claim regarding the petitioner's mental state prior to the part B trial that he could not raise against himself. . . . [Reich] acknowledged his conflict in representing the petitioner because it would preclude him from raising the claim that this could have been raised on appeal. The record demonstrates that the issue was not raised on direct appeal, but it could have been." (Citation omitted.)

The petitioner does not cite to any legal authority in support of his claim. Aside from alleging that Reich should have asserted a claim that he did not, the petitioner does not provide any legal analysis as to what that claim would have entailed or how it would have affected the result of the petitioner's appeal. "While an appellate advocate must provide effective assistance, he is not under an obligation to raise every conceivable issue." (Internal quotation marks omitted.) *McIver* v. *Warden*, 28 Conn. App. 195, 202, 612 A.2d 103, cert. denied, 224 Conn. 906, 615 A.2d 1048 (1992); see also *Moore* v. *Commissioner of Correction*, 119 Conn. App. 530, 540, 988 A.2d 881 (holding that appellate counsel "did not have to argue every colorable claim to render effective assistance"), cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010). In *McIver*, "[t]he petitioner's appellate counsel selected for review those issues that he

believed were strongest and most likely to result in reversal." *McIver* v. *Warden*, supra, 202–203.

Here, although Reich did not present arguments about the petitioner's mental health and competence on direct appeal, the petitioner did not call Reich to testify at the habeas trial to explain why, and the petitioner did not offer any other evidence of Reich's reasons for choosing which claims to raise on direct appeal. In the absence of such evidence, the petitioner did not otherwise meet his burden of overcoming the strong presumption that Reich exercised reasonable professional judgment. See *Bush* v. *Commissioner of Correction*, 169 Conn. App. 540, 550, 151 A.3d 388 (2016) ("There is a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . Just as the decision of trial counsel not to object to certain evidence is a matter of trial tactics, not evidence of incompetency . . . the tactical decision of appellate counsel not to raise a particular claim is ordinarily a matter of appellate tactics, and not evidence of incompetency, in light of the presumption of reasonable professional judgment." (Internal quotation marks omitted.)), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017); see also *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 585, 300 A.3d 607 ("although not automatically fatal to a petitioner's claim, failure to elicit testimony from counsel about trial strategy renders it less likely that the petitioner can prevail with respect to his burden to demonstrate deficient performance"), cert. denied, 348 Conn. 911, 303 A.3d 10 (2023). Accordingly, the court properly rejected the petitioner's ineffective assistance claim as to Reich.

The judgment is affirmed.

In this opinion the other judges concurred.

THE CONNECTICUT LIGHT AND POWER COMPANY *v.* PUBLIC UTILITIES REGULATORY AUTHORITY
(AC 45899)

Suarez, Clark and Seeley, Js.

Syllabus

The plaintiff, E Co., appealed to this court from the trial court's judgment dismissing in part and remanding in part its administrative appeal from a final decision of the defendant, the Public Utilities Regulatory Authority (PURA). In 2017, E Co. filed an application with PURA that sought approval of a multiyear plan to amend its rates. While the rate case was pending, E Co.'s service territory suffered significant damage as a result of five storms. In 2018, PURA approved a settlement agreement with E Co. that resolved the rate case and created a new mechanism to allow E Co. to recover the costs of certain infrastructure investments, including core capital projects, through the base rates charged to its customers. Under this rate mechanism, if E Co. spent more than a specified amount on certain infrastructure investments in a given year, those excess costs could be recovered through a separate charge billed to its customers. The agreement also expressly provided that E Co. could seek review and recovery of all storm costs incurred after December 31, 2016, either during the next rate case or by initiating a separate, contested case. E Co. subsequently initiated a contested case to recover certain expenses it incurred in responding to the five storms, which PURA approved. However, E Co. did not seek to have PURA review and approve certain storm related capital projects but, instead, sought to recover them in its base distribution rates when it filed its annual rate adjustment mechanism application in March, 2021. In its final decision, PURA determined that E Co.'s storm related capital costs did not constitute core capital projects under the 2018 rate settlement and directed E Co. to remove those costs from its core capital program. PURA also ordered that the carrying charges that E Co. accrued on outstanding customer balances be calculated using the prime interest rate rather than the higher weighted average cost of capital. E Co. appealed PURA's decision to the trial court, claiming that PURA violated the terms of the 2018 rate settlement by precluding E Co. from recovering, through base distribution rates, its storm related capital investments, that PURA had no legal basis for directing it to remove the storm related capital investments from its rate recovery, and that PURA erred in retroactively adjusting the rate at which carrying charges are calculated. Following briefing and oral argument, the trial court determined that, as to counts one and two of E Co.'s complaint, PURA had the discretion to resolve the matter as it had done, there was substantial evidence to sustain PURA's decision

regarding E Co.'s storm related capital investments, and that portion of PURA's decision was reasonable. As to count three, the court determined that the issue of the appropriate interest rate to be applied to carrying charges was not fully discussed in PURA's decision because it did not set forth the position of E Co. and the rebuttal by PURA. Accordingly, the court dismissed counts one and two of the complaint and remanded the case to PURA with direction to render a supplemental decision regarding the issue raised in count three. After E Co. appealed the trial court's decision, this court ordered supplemental briefing on the issue of whether E Co.'s appeal should be dismissed for lack of a final judgment because the trial court's decision did not dispose of all counts of E Co.'s complaint. E Co. argued that the trial court's remand order as to count three was a final determination of the issues raised because it constituted an order sustaining its administrative appeal pursuant to statute (§ 4-183 (j)) because PURA's decision failed to comply with the statute (§ 4-180 (c)) governing PURA's final decision. PURA argued that the trial court's remand was a remand for an articulation and that the decision was therefore not a final judgment for purposes of appeal. *Held* that the trial court's decision dismissing in part and remanding in part E Co.'s administrative appeal was not a final judgment for purposes of appeal to this court, and, accordingly, E Co.'s appeal was dismissed for lack of subject matter jurisdiction: on the basis of its review of the record, this court concluded that the remand order constituted a remand for an articulation and not an order sustaining the administrative appeal pursuant to § 4-183 (j) because the court's decision conspicuously lacked any finding that E Co.'s substantial rights were prejudiced as a result of one or more of the errors enumerated in § 4-183 (j); moreover, there was no language in the court's remand order supporting E Co.'s contention that the court sustained its administrative appeal with respect to count three because the court concluded that the decision failed to comply with the requirements of § 4-180 (c); furthermore, the court's remand order, by its own terms, required PURA to clarify the bases for its decision as to count three of E Co.'s complaint by including a discussion of the parties' respective positions on that issue during the course of the administrative proceedings.

Argued November 9—officially released December 26, 2023

Procedural History

Appeal from the decision of the defendant requiring the plaintiff to, inter alia, remove certain catastrophic storm costs from its base distribution rates, brought to the Superior Court in the judicial district of New Britain, where the court, *Cordani*, *J.*, granted the motion to intervene as a defendant filed by the Office of Consumer

Counsel; thereafter, the court, *Hon. Henry S. Cohn*, judge trial referee, dismissed in part and remanded in part the plaintiff's appeal, from which the plaintiff appealed to this court. *Appeal dismissed.*

Vincent P. Pace, with whom were *Damian K. Gunningsmith*, and, on the brief, *David S. Hardy*, for the appellant (plaintiff).

Seth A. Hollander, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant).

James M. Talbert-Slagle, with whom, on the brief, were *Claire E. Coleman* and *William E. Dornbos*, for the appellee (intervenor).

Opinion

CLARK, J. The plaintiff, The Connecticut Light and Power Company, doing business as Eversource Energy (Eversource), appeals from the Superior Court's judgment dismissing in part and remanding in part its administrative appeal from a decision of the defendant, Public Utilities Regulatory Authority (PURA).[1] The heart of this dispute stems from a 2021 decision by PURA that required Eversource to remove $17.188 million of catastrophic storm costs from its base distribution rates. Eversource claims that PURA's decision was improper because it was predicated on a misinterpretation of a 2018 settlement agreement between the parties that established a multiyear electric distribution rate plan for Eversource. On appeal, Eversource claims that the Superior Court erred in (1) reviewing PURA's decision

[1] On November 9, 2021, the Office of Consumer Counsel (OCC) filed in the Superior Court a motion to intervene in the administrative appeal pursuant to General Statutes § 52-102 and Practice Book § 9-6. Pursuant to General Statutes § 16-2a, OCC is the statutory advocate for all Connecticut ratepayers in utility matters. On November 19, 2021, the Superior Court granted OCC's motion and added OCC as a party defendant. For ease of discussion, we refer to the defendants in this opinion individually by name.

under a deferential standard of review, (2) affirming PURA's determination that certain storm related capital plant additions were not properly included in Eversource's "core" capital program under the terms of the parties' settlement agreement, and (3) affirming PURA's decision on the basis of an argument not proffered by PURA in the administrative proceedings. We conclude that the Superior Court's judgment is not an appealable final judgment. Consequently, because we lack subject matter jurisdiction, we dismiss Eversource's appeal.

We begin with the relevant facts and procedural history of the case. Eversource is a public service company that distributes electricity in Connecticut. PURA is the entity responsible for reviewing and regulating the rates that public utility companies, like Eversource, charge their customers. In 2017, Eversource filed an application with PURA that sought approval of a multiyear plan to amend its rates (rate case). While the rate case was pending, Eversource's service territory suffered significant damage as a result of five storms. In 2018, PURA approved a settlement agreement with Eversource that resolved the rate case. The agreement created a new mechanism to allow Eversource to recover, through the base rates charged to its customers, the costs of certain infrastructure investments (plant additions), which included "core" capital projects. Under this rate mechanism, if Eversource spent more than a specified amount on certain plant additions in a given year, those excess costs could be "reconciled" or recovered through an "Electric System Improvement" (ESI) charge billed to its customers. The agreement also expressly provided Eversource with two options for seeking review and recovery of all "storm costs" incurred after December 31, 2016: either during the next rate case or by initiating a separate, contested case sooner.

Later in 2018, Eversource initiated a contested case to recover the "incremental restoration expenses" it incurred in responding to the five storms, such as payments to privately contracted line crews and logistical expenses. In a final decision issued in 2019, PURA approved recovery of $141.026 million of such costs. Eversource did not, however, seek to have PURA review and approve the $17.188 million in capital costs that Eversource incurred in replacing its storm damaged infrastructure. Instead, Eversource categorized these storm related capital costs as core capital plant additions and sought to recover them in its base distribution rates when it filed its annual rate adjustment mechanism (RAM) application in March, 2021.

On September 15, 2021, PURA issued its final decision on Eversource's RAM application. PURA determined that Eversource's storm related capital costs did not constitute core capital additions under the 2018 rate settlement and directed Eversource to remove those costs from its core capital program. Additionally, PURA ordered the "carrying charges" that Eversource accrued on outstanding customer balances to be calculated using the prime interest rate rather than the higher "weighted average cost of capital."

On October 29, 2021, Eversource appealed PURA's decision to the Superior Court pursuant to General Statutes § 4-183. In count one of its complaint, Eversource claimed that PURA violated the terms of the 2018 rate settlement by precluding it from recovering, through base distribution rates, its storm related capital investments. In count two, Eversource claimed that PURA had no legal basis for directing it to remove the storm related capital investments from its rate recovery. In count three, Eversource claimed that PURA erred in retroactively adjusting the rate at which carrying charges are calculated.

On September 23, 2022, following briefing and oral argument, the Superior Court, *Hon. Henry S. Cohn*, judge trial referee, issued a memorandum of decision dismissing in part and remanding in part Eversource's appeal. With respect to counts one and two, the court determined that PURA had "the discretion under [General Statutes] § 16-19e to resolve this matter as it has done" and concluded that there was substantial evidence to sustain PURA's decision regarding Eversource's storm related capital investments and that this portion of the decision was reasonable. As to count three, the court determined that PURA's decision was "lacking," in that the issue of the appropriate interest rate to be applied to carrying charges was "not fully discussed, as [the decision did] not set forth the position of [Eversource] and the rebuttal by PURA." Accordingly, the court concluded that a supplemental decision on this issue was necessary. The court therefore dismissed counts one and two of Eversource's complaint but remanded the case to PURA with direction to render a supplemental decision regarding the issue raised in count three. Eversource appealed to this court from the Superior Court's decision.[2]

After Eversource and PURA filed their appellate briefs in this court, but before oral arguments were held, this court ordered supplemental briefing on the issue of whether Eversource's appeal should be dismissed for lack of a final judgment because the Superior Court's decision from which Eversource appealed did not dispose of all counts of Eversource's complaint, specifically count three, which the court remanded to PURA for a supplemental decision. The parties

[2] After this appeal was filed, PURA issued a supplemental decision on March 22, 2023, pursuant to Judge Cohn's remand order. On March 27, 2023, PURA filed a notice of its supplemental decision in the Superior Court. The same day, the Superior Court issued an order stating that "[t]he supplemental decision has been entered in the record. In light of the pending appeal, neither the court nor the parties need proceed further at this time."

addressed this jurisdictional issue during oral argument before this court.

Although the parties agree that the court's September 23, 2022 decision fully disposed of counts one and two of Eversource's complaint and that the Superior Court remanded count three to PURA, they disagree with respect to whether the court's order remanding the matter to PURA as to count three constituted a final judgment for purposes of appeal. Eversource contends that the remand order was a final determination of the issues raised in count three because it constituted an order sustaining its appeal pursuant to § 4-183 (j). Specifically, it argues that the court's determination that PURA's decision as to count three was "lacking," failed to fully discuss the issues, and failed to set forth the position of Eversource and PURA's response constituted an order sustaining its appeal under § 4-183 (j) for failure to comply with General Statutes § 4-180 (c), which requires agencies to include in any final decision the agency's findings of fact and conclusions of law necessary to its decision.[3]

PURA and the intervenor-appellee, the Office of Consumer Counsel (OCC), interpret the Superior Court's remand order differently.[4] They argue that the court's

[3] General Statutes § 4-180 (c) provides: "A final decision in a contested case shall be in writing or orally stated on the record and, if adverse to a party, shall include the agency's findings of fact and conclusions of law necessary to its decision, including the specific provisions of the general statutes or of regulations adopted by the agency upon which the agency bases its decision. Findings of fact shall be based exclusively on the evidence in the record and on matters noticed. The agency shall state in the final decision the name of each party and the most recent mailing address, provided to the agency, of the party or his authorized representative. The final decision shall be delivered promptly to each party or his authorized representative, personally or by United States mail, certified or registered, postage prepaid, return receipt requested. The final decision shall be effective when personally delivered or mailed or on a later date specified by the agency."

[4] See footnote 1 of this opinion. OCC did not file a principal brief in this appeal. It did, however, file a supplemental brief in response to this court's

remand as to count three is a remand for an articulation and that, pursuant to *Commission on Human Rights & Opportunities* v. *Hartford*, 138 Conn. App. 141, 50 A.3d 917, cert. denied, 307 Conn. 929, 55 A.3d 570 (2012), the court's September 23, 2022 decision was not a final judgment for purposes of appeal. They argue that the Superior Court resolved only two of Eversource's three counts and that Eversource improperly attempts to appeal the court's decision before the court has disposed of all the counts of Eversource's complaint. We agree with PURA and OCC.

General Statutes § 4-184 provides that "[a]n aggrieved party may obtain a review of any final judgment of the Superior Court under this chapter. The appeal shall be taken in accordance with section 51-197b."[5] It is well established that "[t]he lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary." (Internal quotation marks omitted.) *Khan* v. *Hillyer*, 306 Conn. 205, 209, 49 A.3d 996 (2012). To the extent our analysis requires us to interpret the Superior Court's memorandum of decision in this case, it is similarly well established that the construction of a court's order or judgment is also a question of law. See, e.g., *Deutsche Bank National Trust Co.* v. *Gabriele*, 141 Conn. App. 547, 550, 61 A.3d 603 (2013) (construction of order or judgment is question of law).

We begin with the legal principles at play. Section 4-183, which governs appeals under the Uniform Administrative Procedure Act, contains two subsections, (h)

supplemental briefing order issued on September 15, 2023, that requested briefing on the finality of the Superior Court's decision.

[5] General Statutes § 51-197b (e) provides in relevant part: "The procedure on such appeal to the Appellate Court shall be in accordance with the procedure provided by rule or law for the appeal of judgments rendered by the Superior Court unless modified by rule of the judges of the Appellate Court. . . ."

and (j), that authorize remands. "Subsection (h) permits the trial court, prior to a hearing on the merits and upon request of a party, to order that . . . additional evidence be taken before the agency, which in turn allows the agency to modify its findings or decision."[6] (Internal quotation marks omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 558, 964 A.2d 1213 (2009). Remand orders issued under subsection (h) are not final judgments. See *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 138 Conn. App. 151.

Remand orders issued pursuant to subsection (j), on the other hand, are final judgments because they are issued in connection with orders sustaining an administrative appeal following a determination that a party's substantial rights have been prejudiced because the agency's "findings, inferences, conclusions, or decisions" suffer from at least one of six different defects enumerated in that subsection. General Statutes § 4-183 (j). Section 4-183 (j) provides: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other

[6] General Statutes 4-183 (h) provides: "If, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court."

error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k)[7] of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment." (Footnote added.)

Subsections (h) and (j), however, are not the only bases for remands to an administrative agency. See *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 138 Conn. App. 153–54; see also *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 558 n.7. In *Hartford*, this court explained that, "[a]lthough the plain text of § 4-183 expressly refers to remands only in subsection (j) and implicitly refers to remands in subsection (h), it does not state that the types of remands addressed in § 4-183 constitute an exhaustive list despite the legislature's knowledge of how to express such an intent." (Footnote omitted.) *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 153. We made clear that "[r]eviewing courts typically have the ability to obtain articulations from the tribunals whose decisions they review." Id., 153–54. A remand for an articulation is not a final judgment. Id., 154.

In the present case, the Superior Court's memorandum of decision as to count three provided as follows: "With regard to the issue of the appropriate interest rate that [Eversource] may employ on carrying charges,

[7] General Statutes § 4-183 (k) provides: "If a particular agency action is required by law, the court, on sustaining the appeal, may render a judgment that modifies the agency decision, orders the particular agency action, or orders the agency to take such action as may be necessary to effect the particular action."

as indicated at this court's hearing of September 22, 2022, the final decision is lacking. The issue is not fully discussed, as [the decision] does not set forth the position of [Eversource] and the rebuttal by PURA. This portion of the administrative appeal must be remanded to PURA for a supplemental decision." The court's rescript states: "Counts 1 and 2 of the administrative appeal are dismissed and count 3 is remanded."

On the basis of our review, we conclude that the remand order in this case constituted a remand for an articulation and not an order sustaining the appeal pursuant to § 4-183 (j). This court's decision in *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 138 Conn. App. 141, is instructive. In that case, the Superior Court sua sponte raised issues regarding the clarity of the referee's underlying decision. Id., 150. The court ultimately issued an order remanding the matter to the referee " 'to issue a clarification.' " Id. The defendant subsequently filed a motion requesting that the court issue a clarification of its May 4, 2010 remand order. Id. On May 17, 2010, the court issued a clarification that specified three points for the referee to clarify. Id., 150–51.

Thereafter, the referee filed with the court a response to the remand order that addressed the three points for which the court had asked for clarification. Id., 151. The defendant subsequently moved to dismiss the administrative appeal for lack of subject matter jurisdiction, claiming that the remand order of May 4, 2010, was a final judgment pursuant to § 4-183 (j) and that the court's jurisdiction over the administrative appeal had therefore terminated. Id. The Superior Court denied the motion on the basis that the prior remand order was solely for clarification and not an order sustaining the appeal pursuant to § 4-183 (j). Id.

On appeal to this court, this court concluded that the May 4, 2010 remand order was not issued under

subsection (j) of § 4-183. Id., 153. We observed that, "[i]n the clarification of its remand order, the court did not find that the 'substantial rights of the person appealing' had been prejudiced as a result of one or more of the errors enumerated in § 4-183 (j), nor [did] the remand functionally affect substantial rights." Id. This court concluded that "the May 4, 2010 remand order [was] not within the scope of § 4-183, can properly be characterized as a request for an articulation and, therefore, was not a final judgment." Id., 154.

The same is true in the present case. Although Eversource argues that the court's remand order was an order sustaining its appeal pursuant to § 4-183 (j), the court's decision conspicuously lacks any finding that Eversource's substantial rights were prejudiced as a result of one or more of the errors enumerated in § 4-183 (j). See General Statutes § 4-183 (j) ("The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced . . . . If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings."). Further, there is no language in the court's remand order supporting Eversource's contention that the court sustained its appeal with respect to count three because the court concluded that the decision failed to comply with the requirements of § 4-180 (c). Rather, the Superior Court's remand order, by its own terms, required PURA to clarify the bases for its decision as to count three of Eversource's complaint by including a discussion of the parties' respective positions on that issue during the course of the administrative proceedings.[8]

[8] It is worth noting that the "supplemental decision" subsequently filed by PURA is consistent with an articulation and not a new decision following an order sustaining an appeal pursuant to § 4-183 (j). Indeed, the supplemental decision makes clear that, in accordance with the court's order, the supplemental decision "provides further explanation with respect to the calculation of carrying charges in the final decision" and that "[i]t does

We therefore conclude that the remand order in this case is properly characterized as a remand for an articulation.[9]

Having concluded that the court's remand order as to count three was a remand for an articulation and not a remand order pursuant to § 4-183 (j) sustaining Eversource's appeal with respect to that count, we also conclude that the Superior Court's decision did not fully dispose of all counts of Eversource's underlying complaint. As our case law and rules of practice make clear, "[a] judgment that disposes of only a part of a complaint is not a final judgment." (Internal quotation marks omitted.) *Krausman* v. *Liberty Mutual Ins. Co.*, 195 Conn. App. 682, 687, 227 A.3d 91 (2020). Indeed, "[t]he policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level." (Internal quotation marks omitted.) *Heyward* v. *Judicial Dept.*, 159 Conn. App. 794, 799, 124 A.3d 920 (2015).

There are, of course, exceptions to this rule. In particular, a party may appeal if the partial judgment disposes of all causes of action against a particular party or parties; see Practice Book § 61-3; or if the trial court makes a written determination regarding the significance of the issues resolved by the judgment and the

not modify, in any way, the conclusions of [PURA] or the orders in the final decision."

[9] Eversource also appears to argue that judges of the Superior Court lack the authority to order articulations of an administrative agency's decision. Although Eversource acknowledges this court's decision in *Hartford*, which held that a Superior Court, sitting as a reviewing court, has the authority to remand to an agency for an articulation of an agency's decision; *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 138 Conn. App. 153–54; it argues that *Hartford* was wrongly decided and invites us to overrule it. It is well established, however, "that one panel of this court cannot overrule the precedent established by a previous panel's holding." *Staurovsky* v. *Milford Police Dept.*, 164 Conn. App. 182, 202, 134 A.3d 1263 (2016), appeal dismissed, 324 Conn. 693, 154 A.3d 525 (2017).

chief justice or chief judge of the court having appellate jurisdiction concurs. See Practice Book § 61-4 (a). Neither of these exceptions applies here.

In sum, Connecticut law makes clear that appellate review must wait until there is a final judgment in the underlying action as to all counts of a complaint. Because the present appeal was taken prior to the Superior Court rendering a final judgment on all counts of Eversource's complaint, this court lacks jurisdiction over Eversource's appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

J. G. *v.* JEREMIAH CURTIS-SHANLEY*
(AC 46371)

Moll, Seeley and Harper, Js.

Syllabus

The self-represented defendant appealed to this court from the judgment of the trial court granting the plaintiff's application for a civil protection order filed pursuant to statute (§ 46b-16a). This court granted the defendant's request to appear remotely at oral argument, specifically indicating that he was to appear by video conference. When the defendant appeared at the scheduled argument, he connected by way of audio only. Prior to the start of his argument, while this court was addressing the defendant, he unilaterally terminated his attendance by ending the call. The defendant did not reappear or otherwise contact this court prior to the conclusion of the court's docket. Thereafter, in response to this court's issuance of an order to show cause as to why his appeal should not be dismissed in light of his actions, the defendant filed a response. *Held* that, pursuant to the applicable rules of practice (§§ 85-2 and 85-3), this court concluded that the sanction of dismissal was

* 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, a protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

warranted because the defendant failed to show cause as to why his appeal should not be dismissed, and, accordingly, the appeal was dismissed and the order of protection remained in full effect.

Submitted on briefs October 19—officially released December 26, 2023

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of Fairfield, where the court, *T. Welch, J.*, issued an ex parte civil protection order; thereafter, the court, *Hon. William Holden*, judge trial referee, granted the application and issued an order of protection, from which the defendant appealed to this court. *Appeal dismissed.*

Jeremiah Curtis-Shanley, self-represented, filed a brief as the appellant (defendant).

Opinion

PER CURIAM. The self-represented defendant, Jeremiah Curtis-Shanley, appeals from the judgment of the trial court granting the application for a civil protection order filed by the plaintiff, J. G., pursuant to General Statutes § 46b-16a.[1] Because the defendant failed to show cause as to why his appeal should not be dismissed for his unilaterally terminating his attendance at oral argument, we dismiss the appeal.

The record reflects the following facts and procedural history. On February 27, 2023, pursuant to § 46b-16a, the plaintiff filed an application for a civil protection order.[2] In her application and the personal affidavit

[1] The plaintiff did not file a brief or otherwise participate in the present appeal.

[2] The plaintiff first filed an application for a civil protection order pursuant to § 46b-16a against the defendant on February 6, 2023. On that same day, the court, *Reed, J.*, issued an ex parte protection order and scheduled an evidentiary hearing on the application for February 15, 2023. The plaintiff did not appear at the hearing. As a result, the court, *Hon. William Holden*, judge trial referee, rendered a judgment of dismissal pursuant to Practice Book § 14-3. The plaintiff subsequently filed the February 27, 2023 application, the granting of which underlies the present appeal.

attached thereto, the plaintiff alleged that the defendant was stalking her and causing her to fear for her safety. On that same day, the court, *T. Welch*, *J.*, issued an ex parte civil protection order. On March 8, 2023, the court, *Hon. William Holden*, judge trial referee, conducted an evidentiary hearing on the application. At the conclusion of the hearing, the court granted the application for protection.[3] This appeal followed.

On September 28, 2023, the defendant requested permission to attend oral argument before this court from a remote location. On October 3, 2023, the court granted the defendant permission to appear remotely at oral argument, specifically, by video conference. When the defendant appeared at the scheduled argument on October 19, 2023, however, he connected from a remote location by way of audio only. Following what was the defendant's obvious falsehood to court staff concerning his ability to appear by video, as described in footnote 4 of this opinion, the court then opened the session, confirmed that the defendant was able to hear the court, and provided the defendant with a few preliminary instructions concerning, inter alia, safeguards to protect the identity of the protected party and the defendant's claims regarding his appearing by audio only.[4] While the court was addressing the defendant, the defendant unilaterally terminated his attendance by ending the call. The defendant neither reappeared nor otherwise

[3] On August 10, 2023, the court issued a memorandum of decision.

[4] The court stated in relevant part: "Mr. Curtis-Shanley, I understand from [Appellate Court staff] that, when you connected [for argument], you first requested that you wouldn't have to appear by video because you're not feeling well, and, when that request was denied, you indicated . . . that you don't have a video camera connected to your computer. So, assuming that that is true, I want to give you two options. The first is you can waive oral argument today, or, alternatively, we can reschedule your matter to a future term of this court when you would be able to coordinate yourself such that you could appear by video. So, which option would you like to proceed with?" No response was given, and court staff indicated that the defendant had "hung up."

contacted the court as of the conclusion of the court's docket. Nor did the defendant submit, prior to the issuance of the order to show cause, any filing providing an explanation for unilaterally terminating his attendance at oral argument.[5]

On November 17, 2023, this court ordered the defendant to show cause as to why his appeal should not be dismissed as a result of his unilaterally terminating his attendance at oral argument. See Practice Book §§ 85-2 and 85-3; see also *In re Shanice P.*, 64 Conn. App. 78, 79, 779 A.2d 151 (2001). In the show cause order, we required that the defendant "submit a response . . . on or before December 8, 2023." (Footnote omitted.) On December 8, 2023, the defendant filed a response, which we have considered. In light of the foregoing, pursuant to Practice Book §§ 85-2 and 85-3, we conclude that the sanction of dismissal is warranted. Accordingly, we dismiss the appeal; the order of protection remains in full effect.

The appeal is dismissed.

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[5] The court's staff unsuccessfully attempted to contact the defendant using the telephone number he provided on page one of his appellate brief. The court deemed the defendant's conduct to be a forfeiture of his right to oral argument.