CITY OF TORRINGTON *v.* COUNCIL 4, AFSCME, AFL-CIO, LOCAL 442, ET AL.
(AC 46927)

Alvord, Westbrook and Prescott, Js.

Syllabus

Pursuant to part I of chapter 909 of the General Statutes, the Revised Uniform Arbitration Act (§§ 52-407aa through 52-407eee) governs arbitration agreements made on or after October 1, 2018, subject to certain exceptions.

Pursuant further to part II of chapter 909 of the General Statutes, titled "Other Arbitration Proceedings," the provisions of other statutes (§§ 52-408 through 52-424) govern arbitration agreements made before October 1, 2018.

The plaintiff city sought to vacate an arbitration award in favor of the defendants, P, a former police sergeant who was employed by the city, and a union, of which P was a member, arising from the termination of P's employment for allegedly violating the city's excessive force policy

and related federal law. Pursuant to a municipal collective bargaining agreement, executed in 2020, the union submitted a grievance regarding P's employment termination to the state arbitration board. After a hearing, a three member panel of the board concluded that P's employment had not been terminated for just cause and that he should be reinstated with full back pay. The city filed in the Superior Court an application to vacate the arbitration award pursuant to the applicable statutes (§§ 52-418 and 52-420), claiming, inter alia, that the arbitration panel exceeded its powers and misapplied the law. The defendants filed a combined objection and application to confirm the arbitration award. The Superior Court vacated the arbitration panel's award and remanded the matter to the arbitration board for a new hearing on the merits of the grievance, from which the defendants appealed to this court. The city filed a motion to dismiss the appeal for lack of subject matter jurisdiction on the ground that the judgment of the Superior Court did not constitute a final judgment. The city, in relying on the statute (§ 52-407bbb (a) (5)) in part I of chapter 909 that provides that an appeal may be taken from an order vacating an award without directing a rehearing, claimed that, because the Superior Court expressly directed a rehearing, the defendants did not appeal from a final judgment. The defendants objected, claiming that, because they had filed a combined opposition and application to confirm the award, specific statutes (§§ 52-423 and 52-407bbb (a) (3)) provided them with the statutory basis to appeal from an order denying the confirmation of an award. *Held* that this court denied the plaintiff's motion to dismiss the defendants' appeal for lack of a final judgment: because this appeal arose in the context of a municipal collective bargaining agreement and is governed by various provisions (§ 7-467 et seq.) of chapter 113 of the General Statutes, one of the exceptions in part I of chapter 909 was applicable, specifically, the exception in the statute (§ 52-407cc) that provides that a proceeding under chapter 113 shall be subject to part II of chapter 909, regardless of the date the agreement was executed, and, under § 52-423, found in part II of chapter 909, and under *Board of Education* v. *East Haven Education Assn.* (66 Conn. App. 202), the defendants had a right to appeal from orders related to the judicial enforcement of arbitration awards and specifically provides a right of appeal from an order vacating an arbitration award.

Considered December 13, 2023—officially released March 19, 2024

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Litchfield at Torrington, where the defendants filed a combined objection and application to confirm the award; thereafter, the court, *Lynch, J.*, rendered judgment granting

the plaintiff's application to vacate the arbitration award, denied the defendants' application to confirm the award, and ordered the matter remanded to the arbitration board for a new hearing; subsequently, the court denied in part the defendants' motion for reconsideration, and the defendants appealed to this court; thereafter, the plaintiff filed a motion to dismiss the appeal. *Motion to dismiss appeal denied.*

Megan L. Nielsen and *Michael J. Rose*, in support of the motion.

Mario Cerame, in opposition to the motion.

Joshua Perry, solicitor general, and *William Tong*, attorney general, filed a brief for the State Board of Mediation and Arbitration as amicus curiae.

Opinion

PRESCOTT, J. This appeal presents a matter of first impression: whether a judgment of the Superior Court vacating an arbitration award and remanding the matter for a new arbitration hearing is a final judgment for purposes of an appeal pursuant to applicable statutes governing arbitration proceedings and municipal collective bargaining. We conclude that the defendants, Gerald Peters (Peters) and Council 4, AFSCME, AFL-CIO, Local 442 (union), have appealed from a final judgment in this case and, accordingly, deny the motion to dismiss the appeal filed by the plaintiff, the city of Torrington (city).[1]

The following facts and procedural history are relevant to our resolution of the city's motion to dismiss this appeal. Having been employed by the city since 2001, Peters served as a sergeant in its police department and was a member of the union. On May 11, 2021,

[1] On December 13, 2023, this court denied the city's motion to dismiss the appeal and indicated that an opinion would follow. This opinion explains our reasons for that determination.

the city terminated Peters' employment because the city concluded that he had violated its excessive force policy and related federal law.

Prior to the termination of Peters' employment, the city and the union entered into a collective bargaining agreement to which Peters was a third-party beneficiary. The agreement was effective from July 1, 2020, through June 30, 2023, and was operative at the time of Peters' discharge. The agreement established a grievance procedure that permitted the union or its members to challenge adverse employment actions taken by the city. The grievance procedure involved a multistep administrative process that allowed the union to submit a grievance to one or more arbitrators of the Connecticut State Board of Mediation and Arbitration (board) for a binding decision. Additionally, the agreement provided that an employee's termination from employment with the city was permitted only for "just cause."

The union submitted a grievance regarding the termination of Peters' employment to a three member panel of the board in 2022. On February 24, 2023, after a lengthy hearing, the panel issued a decision in which it concluded that Peters' employment had not been terminated for "just cause" and that he should be reinstated "with full back pay."

On March 22, 2023, pursuant to General Statutes §§ 52-418 and 52-420 and Practice Book § 23-1, the city filed in the Superior Court an application to vacate the arbitration award. The city asserted that it was entitled to have the award vacated because (1) the arbitrators exceeded their powers and misapplied the law, (2) the arbitration award violated public policy, and (3) the arbitrators improperly utilized a subjective standard for assessing the propriety of Peters' use of force. The city also requested an order staying the enforcement of the award.

On April 20, 2023, the defendants filed a combined objection and application to confirm the arbitration award. They argued that the city failed to satisfy any one of the four enumerated grounds required to vacate an award as provided in § 52-418 (a)[2] and that the award should be confirmed.

On July 18, 2023, the court issued its memorandum of decision in favor of the city, vacating the panel's award and ordering that the matter be remanded to the board for a new hearing on the merits of the grievance. The court concluded that the panel improperly applied a subjective standard rather than an objective standard to assess whether Peters' use of force was reasonable and thus exceeded its authority under § 52-418 (a) (4). The court also concluded that reinstating him to his position as a police officer would violate public policy if his use of force was objectively unreasonable.

On August 28, 2023, the defendants timely filed a motion for reconsideration of the court's judgment or, in the alternative, for clarification of it. On September 7, 2023, the city filed an objection to the defendants' motion for reconsideration or clarification. In their filings, the parties agreed that the Superior Court should clarify whether the arbitration on remand must be conducted by a new panel of arbitrators.

On September 18, 2023, the Superior Court, *Lynch*, *J.*, denied in part and granted in part the defendants'

[2] General Statutes § 52-418 (a) provides in relevant part that, "[u]pon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

motion for reconsideration. It clarified that "the court does not vacate that part of its decision finding that the panel exceeded its authority." Rather, the court "exercise[d] its discretion" to clarify that the arbitration should be conducted by "a new panel" of arbitrators.

The defendants timely filed this appeal on September 19, 2023.[3] On September 21, 2023, the city filed a motion to dismiss this appeal for lack of subject matter jurisdiction because, in its view, the judgment did not constitute a final judgment for purposes of an appeal. On October 2, 2023, the defendants filed their opposition.

On November 17, 2023, the board, through the Office of the Attorney General, filed an application for permission to appear as amicus curiae and to file a brief addressing the city's motion to dismiss. This court granted the application and limited the amicus brief to the issue of appellate jurisdiction. The order also permitted the parties to file supplemental memoranda in response to the board's brief.

On November 27, 2023, the board filed its amicus curiae brief in which it argues that the Superior Court's judgment vacating the award and remanding the matter for a new arbitration hearing constituted a final judgment from which an appeal could be immediately taken. Neither the defendants nor the city filed responsive memoranda, although the city subsequently did file a notice of supplemental authority.[4]

We begin our analysis by recognizing that "[t]he lack of a final judgment implicates the subject matter juris-

[3] On July 21, 2023, the defendants filed a motion for extension of time to file an appeal, which the Superior Court granted. The order extended the time to appeal to Monday, August 27, 2023. See Practice Book §§ 63-1 and 66-1. The motion for reconsideration was therefore filed within the appeal period. See Practice Book § 63-1 (c) (1).

[4] In its notice, the city acknowledged that this court's decision in *Board of Education* v. *East Haven Education Assn.*, 66 Conn. App. 202, 784 A.2d 958 (2001), is adverse to its claim but argues that it was wrongly decided.

diction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law . . . . We commence the discussion of our appellate jurisdiction by recognizing that there is no constitutional right to an appeal. . . . Article fifth, § 1, of the Connecticut constitution provides for a Supreme Court, a Superior Court and such lower courts as the [G]eneral [A]ssembly shall . . . ordain and establish, and that [t]he powers and jurisdiction of these courts *shall be defined by law*. . . . To consider the . . . claims [raised in the motion to dismiss], we must apply the law governing our appellate jurisdiction, which is statutory. . . . The legislature has enacted . . . [General Statutes] § 52-263, which limits the right of appeal to those appeals filed by aggrieved parties on issues of law from final judgments. Unless a specific right to appeal otherwise has been provided by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim . . . . Further, we have recognized that limiting appeals to final judgments serves the important public policy of minimizing interference with and delay in the resolution of trial court proceedings. . . .

"Thus, [a]s a general rule, an interlocutory ruling may not be appealed pending the final disposition of a case. . . . In determining whether a judgment or a ruling is an immediately appealable final judgment, courts have routinely looked to a statute's text to see if the legislature has provided an express right to appeal. . . . In those instances [in which] the legislature has not provided such an express right, our courts then continue to consider whether the right at issue implicates one of the two prongs set forth in *State* v. *Curcio*, [191 Conn. 27, 31, 463 A.2d 566 (1983)]." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Smith* v. *Supple*, 346 Conn. 928, 936–38, 293 A.3d 851 (2023).

Accordingly, we turn first to chapter 909 of the General Statutes, which pertains to "Arbitration Proceedings." It contains two parts that control alternatively under certain circumstances: part I, also referred to as the Revised Uniform Arbitration Act, which consists of General Statutes §§ 52-407aa through 52-407eee; and part II, titled "Other Arbitration Provisions," which consists of General Statutes §§ 52-408 through 52-424. See generally *DiTullio* v. *LM General Ins. Co.*, 210 Conn. App. 347, 350 n.2, 270 A.3d 99 (2022) (parts I and II apply alternatively). The General Assembly enacted part I in 2018 to govern arbitration agreements made on or after October 1, 2018, subject to certain exceptions. See General Statutes §§ 52-407cc and 52-407eee.[5]

The parties and amicus curiae disagree as to the controlling sections of chapter 909. The city argues that "[t]here is no statutory right to bring an appeal on an order vacating an arbitration decision when the court has *expressly* directed . . . a hearing." (Emphasis in original.) It relies on General Statutes § 52-407bbb (a) (5), which provides that an appeal may be taken from "an order vacating an award *without directing a*

[5] General Statutes § 52-407cc provides: "Sections 52-407aa to 52-407eee, inclusive, govern an agreement to arbitrate made on or after October 1, 2018, except that any proceeding that is governed by chapter 48, 68, 113, 166 or 743b, or any other provision of the general statutes, related to an agreement to arbitrate that was made prior to, on or after October 1, 2018, shall be subject to part II of this chapter, unless:

(1) (A) All the parties to the proceeding agree in a record to be governed by sections 52-407aa to 52-407eee, inclusive, and (B) the agreement under subparagraph (A) of this subdivision is permitted by a law of this state other than sections 52-407aa to 52-407eee, inclusive; or

(2) The proceeding is governed by sections 52-407aa to 52-407eee, inclusive, pursuant to a law of this state other than sections 52-407aa to 52-407eee, inclusive."

General Statutes § 52-407eee provides: "The provisions of sections 52-407aa to 52-407ddd, inclusive, do not affect an action or proceeding commenced or right accrued before October 1, 2018. Subject to section 52-407cc, an arbitration agreement made before October 1, 2018, is governed by sections 52-408 to 52-424, inclusive."

rehearing . . . .'' (Emphasis in original.) Because the court in the present case expressly directed a rehearing, the city maintains that this court does not have jurisdiction over the appeal because the defendants did not appeal from a final judgment.

The defendants argue that the court's order vacating the board's arbitration award is appealable under General Statutes § 52-423, which provides that ''[a]n appeal may be taken from an order . . . vacating . . . an award . . . as in ordinary civil actions.'' The defendants additionally rely on § 52-407bbb (a) (3), which provides that ''[a]n appeal may be taken from . . . *an order confirming or denying confirmation of an award* . . . .'' (Emphasis added.) Because they filed a combined opposition and application to confirm the award, to the extent that the court implicitly denied their application to confirm the award, the defendants contend that ''§ 52-407bbb (a) (3) provides a specific statutory basis to appeal [from] an order denying confirmation of an award.''

The board argues in its amicus brief that both parties misapprehend the law, in part, by invoking § 52-407bbb. The agreement in the present case was executed in 2020. The board argues that, although § 52-407bbb and part I of chapter 909 generally apply to arbitration agreements made on or after October 1, 2018, one of the exceptions in § 52-407cc causes part II of chapter 909 to control instead of part I. According to the board, under § 52-407cc, ''the General Assembly carved out an exception for municipal employee contract grievances'' and, therefore, the ''arbitration proceedings are controlled by the older rules in part II of chapter 909. ''As such, it argues that the disposition of this motion ''is controlled by § 52-423 . . . .''

We agree with the board that one of the exceptions in § 52-407cc of part I applies, despite part II ordinarily

controlling only agreements executed prior to October 1, 2018. Section 52-407cc provides that, if an agreement is concurrently "governed by chapter . . . 113," it "shall be subject to part II of this chapter" regardless of execution date.[6]

Chapter 113, consisting of General Statutes § 7-467 et seq., includes the Connecticut Municipal Employee Relations Act (MERA). MERA applies to any "municipal employer," which is defined as including "any political subdivision of the state, including any . . . city"; General Statutes § 7-467 (1); and extends collective bargaining rights to municipal employees. See generally *Winchester* v. *State Board of Labor Relations*, 175 Conn. 349, 354–55, 402 A.2d 332 (1978) (discussing provenance of MERA and how it governs municipal employees' rights to organize and bargain collectively).

Section 52-423, which is found in part II of chapter 909, "expressly confers on parties the right to appeal from orders related to the judicial enforcement of arbitration awards . . . ." *Blondeau* v. *Baltierra*, 337 Conn. 127, 135, 252 A.3d 317 (2021). Specifically, § 52-423 "provides a statutory right of appeal from an order vacating an arbitration award . . . ." Id.; see General Statutes § 52-423.

In *Board of Education* v. *East Haven Education Assn.*, 66 Conn. App. 202, 784 A.2d 958 (2001), this court concluded that an appeal from an order vacating an arbitration award and remanding the matter for a rehearing on the merits is an appealable final judgment under

[6] As noted in footnote 5 of this opinion, § 52-407cc includes two exceptions to this general rule. See General Statutes § 52-407cc (1) and (2) (regarding parties who agree to govern their proceedings by §§ 52-407aa through 52-407eee, among other conditions; or where proceedings are governed by §§ 52-407aa through 52-407eee, pursuant to state law other than §§ 52-407aa through 52-407eee). It is undisputed that neither exception applies in this case.

§ 52-423. Id., 208–209. This court observed that "§ 52-423 has been recognized as the authoritative source of law concerning appellate jurisdiction to consider the merits of arbitration appeals . . . [including] a judicial decree ordering a remand for further arbitral proceedings." (Citations omitted.) Id., 209.

Similarly, in the present case, the Superior Court vacated the arbitration award and remanded the matter for a rehearing before a new panel of the board. As such, § 52-423 provides the defendants a statutory right to appeal because "[a]n appeal may be taken from an order . . . vacating . . . an award" and remanding the matter for a new hearing.[7] Accordingly, we conclude that the defendants' appeal from the Superior Court's order vacating the award and remanding the matter for a new hearing was taken from a final judgment.[8] Because this appeal arises in the context of a municipal collective bargaining agreement, the Superior Court's order vacating the arbitration award and remanding the matter for a rehearing is an appealable final judgment under §§ 52-407cc and 52-423 and *Board of Education* v. *East Haven Education Assn.*, supra, 66 Conn. App. 208–209.

The motion to dismiss is denied.

In this opinion the other judges concurred.

[7] Our analysis under § 52-423 and relevant case law, such as *Board of Education* v. *East Haven Education Assn.*, supra, 66 Conn. App. 208–209, is the same regardless of whether part II of chapter 909 applies in accordance with the general rule in § 52-407eee or if it applies by way of the exceptions in § 52-407cc.

[8] This conclusion obviates the need to analyze the parties' arguments regarding § 52-407bbb (a) (3) and (5) because that section is in part I of chapter 909, which does not apply here. Our conclusion also obviates the need to address the parties' arguments concerning whether the Superior Court's decision is immediately appealable under the second prong of *Curcio*. "*Curcio*'s common-law rule is superseded" by § 52-423 in cases in which the Superior Court has vacated an arbitration award and remanded for rehearing. *Board of Education* v. *East Haven Education Assn.*, supra, 66 Conn. App. 208–209.

ALYSSA BARTOLOTTA *v.* HUMAN RESOURCES AGENCY OF NEW BRITAIN, INC.
(AC 46091)

Elgo, Cradle and Seeley, Js.

Syllabus

Pursuant to statute (§ 21a-408p), no employer may discharge an employee solely on the basis of such employee's status as a person qualified to use medical marijuana under the Palliative Use of Marijuana Act (§ 21a-408 et seq.).

The plaintiff, whose employment as a preschool teaching assistant with the defendant had been terminated, sought to recover damages from the defendant for, inter alia, its alleged discrimination against her because of her disability, epilepsy. At the time of her hire, the plaintiff acknowledged receipt of the defendant's drug free workplace policy and employee handbook, which included provisions stating that working while under the influence of drugs could result in the termination of her employment. She did not inform the defendant that she suffered from epilepsy until after she experienced a seizure while at work. The defendant thereafter adopted a medical alert protocol for the plaintiff, allowed her, in her discretion, to leave work for the day whenever she experienced a seizure, and transferred her to a different classroom to ensure she would be accompanied by another adult at all times for her safety and the safety of the students. In October, 2018, the plaintiff additionally requested that the nurse on site store Valium in her office and administer it to the plaintiff after she had a seizure. The defendant denied this request in part because the nurse was not permitted to administer medications to the staff, but the defendant did not prohibit the plaintiff from bringing Valium and using it in the workplace as needed. In January, 2019, an incident occurred during which the plaintiff called a child the wrong name in front of D, a teacher at the facility, and told D that she was a medical marijuana user and was feeling the effects from it. D reported this interaction to E, the defendant's education manager, and the defendant conducted an investigation into the plaintiff's purported drug use. During the course of the investigation, E and G, the defendant's human resources director, conducted an investigatory interview with the plaintiff, in which the plaintiff admitted that she had reported to work while impaired, which she said was caused by taking too much medical marijuana. As part of its investigation, the defendant also interviewed L, the teacher assigned to the plaintiff's classroom, who noted that the plaintiff had been droopy and unsteady on her feet in the weeks prior to the January, 2019 incident, and the defendant received a letter from B, an employee who stated that the plaintiff had informed him that she was taking medical marijuana. The defendant requested that the plaintiff

submit to a drug test, which came back negative for marijuana. The plaintiff additionally submitted a physician's letter to the defendant stating that she was a medical marijuana user with a prescription to use a vape pen daily at 8 p.m. At the conclusion of its investigation, the defendant terminated the plaintiff's employment for reporting to work while impaired by marijuana. In a four count complaint alleging violations of a provision (§ 46a-60 (b) (1)) of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.), a violation of § 21a-408p, and wrongful termination in violation of a drug testing statute (§ 31-51x), the plaintiff claimed that the defendant had discriminated against her on the basis of her disability and her qualification as a medical marijuana user. The defendant moved for summary judgment, asserting, inter alia, that the plaintiff could not establish a prima facie case of discrimination, it had provided her with reasonable accommodations for her disability, it had a reasonable suspicion that she was impaired in the workplace before it directed her to submit to drug testing, and her discrimination and reasonable accommodation claims were time barred. The court granted the defendant's motion, and the plaintiff appealed to this court. *Held*:

1. The trial court properly rendered summary judgment for the defendant on the count of the plaintiff's complaint alleging that the defendant violated § 21a-408p (b) (3) by improperly terminating her employment due to her status as a person qualified to use medical marijuana under the Palliative Use of Marijuana Act: no genuine issue of material fact existed as to whether the defendant violated the statute, as its investigation into the plaintiff's January, 2019 conduct originated in D's report that the plaintiff had been impaired in the workplace and was commenced before the plaintiff informed the defendant that she was a qualified user of medical marijuana, thus, the plaintiff could not establish that the defendant discharged her solely on the basis of her status as a qualifying patient; moreover, the defendant's stated decision to terminate the plaintiff's employment for reporting to work in an impaired state was expressly permitted by § 21a-408p (b) (3).
2. The trial court properly rendered summary judgment for the defendant on the count of the plaintiff's complaint alleging discrimination on the basis of disability: the court did not apply an improper legal standard in evaluating that claim, as it explicitly determined that the plaintiff had not met her burden under either the mixed-motive or the pretext model of analysis; moreover, the plaintiff did not raise a genuine issue of material fact as to whether her disability played a substantial role in the defendant's decision to terminate her employment, as notes from the investigatory interview indicated that G specifically asked the plaintiff if she understood that the defendant's alarm over the January, 2019 incident had nothing to do with the plaintiff's epilepsy, to which the plaintiff responded in the affirmative, the written disciplinary notice that the defendant furnished to the plaintiff made no mention of the

plaintiff's disability, and the record indicated that the defendant proactively took multiple steps to accommodate the plaintiff's epilepsy once it learned of it; furthermore, the plaintiff could not satisfy her burden to raise a genuine issue of material fact that the real reason for her termination was membership in a protected class, as the defendant stated a legitimate, nondiscriminatory reason for its decision to terminate her employment, and the plaintiff did not submit any evidence to demonstrate or argue on appeal that that reason was pretextual.

3. The trial court properly rendered summary judgment for the defendant on the count of the plaintiff's complaint alleging failure to accommodate her disability in violation of § 46a-60 (b) (1):

a. The plaintiff's claim with respect to the defendant's denial in October, 2018, of her request to store Valium in the nurse's office and have the nurse administer the Valium to her occurred more than 180 days before she filed a complaint of disability discrimination with the Commission on Human Rights and Opportunities in May, 2019, and the plaintiff did not allege that waiver, consent, or another equitable tolling doctrine applied to the accommodation request, thus, the claim with respect to that request was time barred by the statute of limitations ((Rev. to 2017) § 46a-82 (f)).

b. No genuine issue existed as to whether the plaintiff made a medical marijuana accommodation request or whether the defendant violated § 46a-60 (b) (1) by denying such a request: the record did not reflect that the plaintiff requested an accommodation for her medical marijuana use, as she did not disclose her use of medical marijuana to the defendant until after the January, 2019 incident, the letter she furnished from her physician did not request or recommend any accommodations regarding her use of medical marijuana, and she acknowledged during her deposition that there was no reference to medical marijuana in her request for accommodation with respect to her use of Valium; moreover, the plaintiff provided no legal authority to support the proposition that the defendant should have allowed her to use her medical marijuana during the workday or to appear at the preschool facility in an impaired state; furthermore, the plaintiff never suggested that she could properly perform the job of a preschool teaching assistant while impaired by the use of medical marijuana.

4. The trial court properly rendered summary judgment for the defendant on the count of the plaintiff's complaint alleging that the defendant violated § 31-51x by requiring her to take a drug test following the January, 2019 incident; no genuine issue of material fact existed as to whether the defendant had a reasonable suspicion to require the plaintiff to take a drug test, as D and L had provided observations to the defendant of the plaintiff in the workplace that indicated a concern for the safety of the children in the plaintiff's care, B had informed the defendant by letter that the plaintiff claimed to use medical marijuana, and the plaintiff had admitted to E and G that she used medical marijuana and may have

used too much, and a reasonable person armed with that information would have suspected that the plaintiff had been under the influence of drugs in the classroom, which could adversely impact her job performance.

Argued October 19, 2023—officially released March 19, 2024

Procedural History

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

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

Tamara M. Nyce, with whom, on the brief, was *Howard K. Levine*, for the appellee (defendant).

Opinion

ELGO, J. The plaintiff, Alyssa Bartolotta, appeals from the summary judgment rendered by the trial court in favor of the defendant, Human Resources Agency of New Britain, Inc., in this employment discrimination action. On appeal, the plaintiff claims that the court improperly concluded that there is no genuine issue as to any material fact and that the defendant was entitled to judgment as a matter of law on all four counts of her complaint. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant to this appeal. The defendant is a nonprofit organization that provides, inter alia, educational services to qualified children. On February 12, 2018, it hired the plaintiff as a teaching assistant in the early childhood division

at its 180 Clinton Street location in New Britain (facility).[1] In that capacity, the plaintiff worked in classrooms with approximately twenty preschool children.

At the time of her hire, the defendant provided the plaintiff with a copy of its employee handbook, which contained various policies. Policy 701 sets forth "rules of conduct" and provides in relevant part: "To ensure orderly operations and provide the best possible work environment, [the defendant] expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization. . . . The following . . . infractions of rules of conduct . . . shall result in disciplinary action, up to and including termination . . . . Working under the influence of alcohol or illegal drugs . . . ." Policy 703 pertains specifically to drug and alcohol use and provides in relevant part: "[The defendant] will not tolerate any controlled substance or alcohol use that threatens the health, safety or well-being of its employees, clients or the general public. To ensure worker safety and workplace integrity, this agency strictly prohibits the illegal manufacture, possession, distribution or use of controlled substances or alcohol in the workplace by employees. . . ." Appended to the defendant's motion for summary judgment was the plaintiff's signed employee acknowledgment form, in which the plaintiff acknowledged that she "received the handbook" and that she understood "that it is [her] responsibility to read and comply with the policies contained in this handbook . . . ."

The defendant also signed an acknowledgment of the defendant's drug free workplace policy, which stated in relevant part: "I understand that it is unlawful to manufacture, possess, distribute or use controlled substances or alcohol in the workplace. I have been informed

[1] It is undisputed that the plaintiff met the statutory requirements for that position.

that violations of the Drug Free Workplace Policy will result in disciplinary action up to and including termination." In her deposition testimony, the plaintiff admitted that she was aware that her employment could be terminated if she came to work impaired.

The plaintiff has suffered from epilepsy her entire life and experiences, on average, one "bad" seizure a month. She nevertheless did not inform the defendant of that condition until she experienced her first seizure at work.[2] In response, the defendant adopted a medical alert protocol in the spring of 2018 that documented seizure symptoms, protocols, and emergency contacts for the plaintiff. A copy of that protocol, which was titled "Alyssa Bartolotta Medical Alert—Seizure—Partial Complex," was posted on the nurse's desk. The defendant also allowed the plaintiff, in her discretion, to leave for the day whenever she experienced a seizure. In addition, the defendant transferred the plaintiff to a different classroom to ensure that she would be accompanied by a teacher or another teaching assistant at all times, and in the evenings in particular. In her deposition testimony, the plaintiff admitted that this transfer was an accommodation that the defendant provided for her safety, as well as the safety of students.

In October, 2018, the plaintiff provided the defendant with a note from her physician, which requested that the defendant (1) store Valium[3] in the nurse's office and (2) have the nurse administer it to the plaintiff in the

[2] During her deposition, the plaintiff testified that the defendant conducted an interview with her prior to extending an offer of employment. She further testified that, at that time, she did not apprise the defendant of the fact that she had epilepsy.

[3] Valium, known also as diazepam; see *State* v. *Ruscoe*, 119 Conn. App. 834, 837, 989 A.2d 667, cert. denied, 296 Conn. 903, 992 A.2d 330 (2010); is a controlled substance under Connecticut law. See General Statutes § 21a-240 (9); Regs., Conn. State Agencies § 21a-243-10 (a) (15).

event that she had a seizure at work.[4] In her deposition testimony, the plaintiff explained that this note constituted an accommodation request "for the nurse to hold a few doses of Valium locked up somewhere safe, and then for me to lay down for thirty minutes to an hour, rest, and then hop back up and go back to my classroom . . . ."

In a sworn affidavit submitted in support of the defendant's motion for summary judgment, Brenda Sherer, the defendant's Director of Organizational Development and Human Resources, explained that the defendant had a nurse at the facility on only two days each week. Moreover, that nurse was not permitted to administer medications to staff, as such activities exceeded the scope of her employment with the defendant. For that reason, the defendant denied the plaintiff's request in part. At the same time, the defendant, in consultation with the plaintiff, adopted a modified protocol for staff to follow when the plaintiff sustained a seizure at the facility. A copy of that December 5, 2018 protocol was appended to the defendant's motion for summary judgment.[5]

Notably, the plaintiff was not prohibited from using Valium when needed at the facility. At her deposition,

[4] That note contained a list of the plaintiff's medications. The plaintiff's physician then stated that, if the plaintiff "were to have a seizure at work, please send her to the nurse's office. The nurse can administer the Valium."

[5] That protocol was titled "Protocol to follow when staff has a seizure" and stated: "Protocol: Classroom staff will place [the plaintiff] in a safe place in the classroom. Classroom staff will call Health Manager, [Education and Family Services Manager], Assistant Director or Director to let us know [that the plaintiff] had a seizure. In the event that no one can be found classroom staff will call Chuc [at extension] 2235 and she will find someone to help. [They then] will go to the classroom and check on [the plaintiff]. [The plaintiff] will determine if she wants to stay or go home. In the event that [the plaintiff] decides to go home a manager will call the emergency contacts that staff provided to us. Always calling first [the plaintiff's mother]."

the following colloquy occurred between the defendant's counsel and the plaintiff:

"Q. Were you ever told that you could not have your Valium at work?

"A. No.

"Q. You were just told that the nurse could not be the custodian of your Valium; is that right?

"A. Yes. . . .

"Q. So . . . other than [denying the request] to maintain custody of your Valium in the nurse's office, is there anything else that [the defendant] did not accommodate from your request for accommodation?

"A. No."

On January 2, 2019, an incident occurred at the facility between the plaintiff and Amanda Doty, a teacher in the classroom adjacent to the plaintiff's. As Doty averred in her sworn affidavit: "I observed [the plaintiff] call a child by the wrong name. [The plaintiff] told me that she was 'just out of it.' [The plaintiff] then told me that she uses medical marijuana and that her 'head is just not right from it yet.' . . . [Her] comments made me concerned that she was not okay to be in the classroom with the children because she was still feeling the effects of the marijuana." Doty reported the incident to Suzanne Licki, the teacher in the plaintiff's classroom, who advised Doty to notify a supervisor. Doty then informed Ana Erazo, the defendant's Education Manager, of the statements made by the plaintiff that day.

In response, the defendant conducted an investigation into the plaintiff's purported drug use. As Sherer recounted in her affidavit: "On January 8, 2019, [Erazo] and [Human Resources Director] Andrea Goodison met with [the plaintiff] to discuss the report that she was

impaired in the workplace. . . . [The plaintiff] admitted that she reported to work impaired and said the cause was taking too much medical marijuana." Copies of the investigation and interview notes were submitted in support of the defendant's motion for summary judgment,[6] which indicate that, during that investigation, the plaintiff for the first time presented her medical marijuana card to the defendant.[7] Those notes also state in relevant part: "When presented with the allegations of what was reported [by Doty] . . . [the plaintiff] did not deny showing up to work impaired [and stated that] 'I use a disposable vape pen which gives [between fifty and seventy] puffs [of medical marijuana]. I wasn't keeping track and I believe the pen ran out. I take it at [8 p.m.]. . . . It is supposed to wear off within [eight] hours and I take it right after I take the Valium and other seizure medication. There is a possibility I may have used too much [and] more than prescribed [because] I ran out and had [two] seizures the following day. I am prescribed [four] puffs at [a] time." In addition, the notes indicate that the plaintiff "did not deny . . . reporting to work impaired and . . . stated, 'It's my mother's fault! I knew I should've said something [about the use of medical marijuana]' . . . ."

The notes also contain the following colloquy between the plaintiff, Erazo and Goodison:

"[Erazo]: Do you understand that you cannot show up to work impaired because the children require full

[6] In her affidavit, Scherer averred that exhibit A-7 submitted by the defendant was "a true and accurate copy of the investigation and interview notes that were prepared in connection with [the defendant's] investigation."

[7] It is undisputed that the plaintiff did not inform the defendant of her medical marijuana use until the investigation into the January 2, 2019 incident commenced, as she admitted in her deposition testimony. In her complaint, she likewise acknowledged that, "[o]n January 8, 2019, the plaintiff notified the defendant that she takes prescribed medical marijuana and showed her state medical card to the defendant."

attention and if you are impaired you are unable to respond quickly to their needs?

"[The Plaintiff]: Yes, I understand, and I thought [the marijuana] would have worn off by then. My mother is [going to] kill me and I'm mad at myself because I knew I should have told you guys. . . . You guys have been so nice and accommodating and I messed up.

"[Goodison]: Do you understand that this has nothing to do with your epilepsy?

"[The Plaintiff]: Yes, I do."

At the conclusion of her interview, the plaintiff was suspended without pay and directed to submit to a drug test. The results from that test, which was administered six days after the January 2, 2019 incident, came back positive for Valium but negative for marijuana.

As part of the investigation, Goodison interviewed Licki, the teacher who worked with the plaintiff on a daily basis. Licki informed her that, for approximately two weeks prior to the January 2, 2019 incident, she observed the plaintiff "to be forgetful, droopy, and unsteady on her feet." Licki at that time expressed concern regarding the safety of children in the plaintiff's care.

The defendant also received a letter from Chris Badenhop, a coworker at the facility, on January 8, 2019. In that letter, Badenhop stated that, during a conversation in a hallway on January 3, 2019, the plaintiff confided in him that "she was on medical marijuana." Badenhop indicated that he assumed the defendant "knew about this already, as [the plaintiff] so openly told me in the hallway, for others to hear. I didn't realize that this was new information, as I wasn't really involved with this staff member or classroom."

The plaintiff subsequently provided the defendant with a letter from her physician dated January 15, 2019. That letter stated in full: "[The plaintiff] has a medical card to use medical marijuana for anxiety and seizures. She uses a vapor at 8PM daily (2–4 puffs). If you have any questions or concerns, please don't hesitate to call."

On January 23, 2019, officials from the defendant's human resources department met with the plaintiff and informed her of the decision to terminate her employment. The written disciplinary notice issued by the defendant states in relevant part that, during the interview on January 8, 2019, the plaintiff "admitted that [she uses] medical marijuana and did show up to work impaired and that [she] may be abusing it. In addition, during multiple phone calls with the [Human Resources] Director, [she] did not deny showing up [to] work impaired." After detailing both Policy 701 and Policy 703, which are memorialized in the defendant's employee handbook, the notice states that the plaintiff violated "company rules" by reporting to work "impaired as admitted by [the plaintiff] to another staff member. [She] repeated it and never retracted this statement on several occasion[s]." The notice concludes: "[The defendant] has a legal obligation to protect the children in our care. In showing up to work while impaired [the plaintiff] violated the [applicable] standard of care . . . . [The plaintiff] failed to follow company policy and procedures; therefore, [her] employment with [the defendant] is being terminated, effective immediately."

The plaintiff thereafter filed a grievance regarding her termination, which was initially heard by the defendant's grievance committee. After that committee upheld the termination decision, her grievance was heard by the defendant's board of directors. That board, too, concluded that the termination decision was proper.

The plaintiff then filed an employment discrimination complaint with the Commission on Human Rights and

Opportunities (commission) on May 29, 2019. In her accompanying affidavit, the plaintiff alleged that the defendant "terminated [her] employment because of her disability" and "failed to accommodate [her] by prohibiting her from working while taking prescription medication for her disability." On April 20, 2020, the commission issued a release of jurisdiction over the plaintiff's complaint.

On July 16, 2020, the plaintiff commenced the present action against the defendant. Her complaint contains four counts and alleges (1) disability discrimination in violation of General Statutes § 46a-60 (b) (1), (2) failure to accommodate, (3) a violation of General Statutes § 21a-408p, and (4) a violation of General Statutes § 31-51x. In response, the defendant filed an answer and several special defenses.

The plaintiff was deposed by the defendant on January 5, 2022. In her deposition testimony, the plaintiff acknowledged that her employment with the defendant could be terminated if she was impaired in the workplace. She nonetheless maintained that she was not impaired when the incident occurred on January 2, 2019, and that taking medical marijuana "does not make [her] impaired." The plaintiff further averred that the results of the drug test conducted on January 8, 2019, "proves [that she] didn't come to work impaired" on January 2, 2019.

On February 25, 2022, the defendant filed a motion for summary judgment. In its accompanying memorandum of law, the defendant argued: (1) the plaintiff could not establish a prima facie case of discrimination; (2) the plaintiff's failure to accommodate claim failed as a matter of law because the defendant provided the plaintiff with reasonable accommodations for her disability; (3) the plaintiff could not demonstrate that she was terminated because of her status as a qualifying user of

medical marijuana; (4) the plaintiff could not establish a violation of § 31-51x because the defendant had a reasonable suspicion that the plaintiff was impaired in the workplace before it directed her to submit to a urine toxicology drug screening; and (5) the plaintiff's discrimination and reasonable accommodation claims were time barred. Appended to that memorandum were several exhibits, including the sworn affidavits of Sherer, Doty, and Licki, certain policies pertaining to drug use contained in the defendant's employee handbook, the medical protocol adopted by the defendant in the spring of 2018 regarding the plaintiff's seizures, the revised medical protocol adopted on December 5, 2018, copies of the defendant's investigation and interview notes related to the January 2, 2019 incident, the written disciplinary notice that the defendant furnished to the plaintiff on January 23, 2019, and portions of the plaintiff's January 5, 2022 deposition testimony.

The plaintiff filed an objection to the motion for summary judgment, as well as a memorandum of law and exhibits that included her January 5, 2022 deposition testimony, the May 28, 2019 affidavit that she filed with the commission, and the January 15, 2019 letter from her physician regarding her use of medical marijuana. The defendant filed a reply to that objection on June 15, 2022.

The court heard argument from the parties on the motion for summary judgment on August 1, 2022. It thereafter issued a memorandum of decision in which it concluded that summary judgment was appropriate on all four counts of the plaintiff's complaint. The court thus rendered judgment in favor of the defendant, and this appeal followed.

At the outset, we note the well established standard that governs our review of a trial court's decision to grant a motion for summary judgment. "Practice Book

§ 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

I

For purposes of clarity, our analysis begins with the plaintiff's claim that the court improperly rendered summary judgment on the third count of her complaint, which alleges that the defendant violated the Palliative Use of Marijuana Act (act), General Statutes § 21a-408 et seq.[8] More specifically, she alleges that a genuine issue of material fact exists as to whether the defendant violated § 21a-408p (b) (3) by improperly terminating her employment due to her status as a person qualified to use medical marijuana under the act. We disagree.

[8] Although the act has been amended by the legislature since the events underlying this appeal; see, e.g., Public Acts, Spec. Sess., June, 2021, No. 21-1, § 77; those amendments have no bearing on the merits of this appeal. We therefore refer to the current revision of the act in this opinion.

Section 21a-408p (b) provides in relevant part: "(3) No employer may . . . discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient . . . . Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours." It is undisputed that, at the time of her termination, the plaintiff was a qualifying patient, as that term is used in the act; see General Statutes §§ 21a-408 and 21a-408p (a) (7); as she submitted a letter from her physician so indicating on January 15, 2019. It also is undisputed that the plaintiff did not disclose that status to the defendant until approximately one week after the January 2, 2019 incident. See footnote 7 of this opinion.

The plain language of § 21a-408p (b) (3) indicates that, to establish a violation thereof, an employer must be shown to have discharged "an employee *solely* on the basis of such person's or employee's status as a qualifying patient . . . ." (Emphasis added.) In the present case, the record belies such a contention. The investigation into the plaintiff's conduct on January 2, 2019, originated in a report from a coworker that the defendant was impaired in the workplace and was commenced *before* the plaintiff ever informed the defendant that she was a qualified patient under the act. The notes from that investigation contain an exchange between Erazo, Goodison, and the plaintiff, in which the plaintiff affirmatively stated her understanding that the investigation had "nothing to do with [her] epilepsy," but rather concerned the dangers posed to children when teaching staff is impaired in the workplace. Moreover, in her deposition testimony, the plaintiff admitted that the defendant's officials did *not* tell her that she could not take medical marijuana to treat her epilepsy, but

rather simply told her that she could not come to work impaired. In addition, the written disciplinary notice issued by the defendant states in relevant part that the plaintiff violated company policy by reporting to work in an impaired state and concluded that her employment was being terminated because she "failed to follow company policy and procedures" regarding drug and alcohol use in the workplace. In light of that record, the plaintiff cannot establish that the defendant discharged her *solely* on the basis of her status as a qualifying patient.

Section 21a-408p (b) (3) also expressly provides that "[n]othing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours." The plain import of that provision confirms that, while the palliative use of marijuana is authorized under Connecticut law, employers nonetheless may prohibit qualifying patients from being under its influence in the workplace.[9] The policies contained in the defendant's employee handbook, as well as its drug free workplace policy that the plaintiff signed upon commencement of her employment, indicate that the defendant prohibited all employees from being under the influence of drugs or alcohol in the workplace. Accordingly, in light of the defendant's stated decision to terminate the plaintiff for reporting to work in an impaired state, we conclude that no genuine issue of material fact exists as to whether the defendant violated § 21a-408p (b) (3).

[9] In her appellate brief, the plaintiff argues, with respect to her use of medical marijuana, that "[t]erminating an employee for using medication for a disability is the equivalent of terminating an employee because of her disability." She has provided no legal authority for that bald assertion, which runs contrary to the plain language of § 21a-408p (b) (3).

II

The plaintiff contends that the court improperly rendered summary judgment on the first count of her complaint, which alleges disability discrimination in violation of § 46a-60 (b) (1), a provision of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq.[10] We do not agree.

A

As a threshold issue, we address the plaintiff's claim that the court applied an improper legal standard in evaluating her disability discrimination claim. She claims that the court improperly applied the *McDonnell Douglas-Burdine* pretext model of analysis; see *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); rather than the mixed-motive model established in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 246, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). Our review of that question of law is plenary. See *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 214, 192 A.3d 406 (2018) (whether trial court applied proper legal standard is subject to plenary review on appeal).

"Under the analysis of the disparate treatment theory of liability, there are two general methods to allocate

[10] General Statutes § 46a-60 provides in relevant part: "(b) It shall be a discriminatory practice in violation of this section . . . (1) For an employer . . . to discharge from employment any individual or to discriminate against any individual . . . because of the individual's . . . present or past history of mental disability, intellectual disability, learning disability, physical disability . . . ."

Under CFEPA, " '[p]hysically disabled' refers to any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy . . . ." General Statutes § 46a-51 (15).

the burdens of proof: (1) the mixed-motive/*Price Waterhouse* model . . . and (2) the pretext/*McDonnell Douglas-Burdine* model." (Citation omitted; footnote omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 104–105, 671 A.2d 349 (1996). Those two methods of proof apply to claims of intentional discrimination. See *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 403, 880 A.2d 151 (2005). "A mixed-motive case exists when an employment decision is motivated by both legitimate and illegitimate reasons. . . . In such instances, a plaintiff must demonstrate that the employer's decision was motivated by one or more prohibited statutory factors. Whether through direct evidence or circumstantial evidence, a plaintiff must submit enough evidence that, if believed, could reasonably allow a [fact finder] to conclude that the adverse employment consequences resulted because of an impermissible factor." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, supra, 105. "Under [the mixed-motive] model, the plaintiff's prima facie case requires that the plaintiff prove by a preponderance of the evidence that he or she is within a protected class and that an impermissible factor played a 'motivating' or 'substantial' role in the employment decision." Id., 106.

Our Supreme Court further explained that, "[o]ften, a plaintiff cannot prove directly the reasons that motivated an employment decision. Nevertheless, a plaintiff may establish a prima facie case of discrimination through inference by presenting facts [that are] sufficient to remove the most likely bona fide reasons for an employment action . . . . From a showing that an employment decision was not made for legitimate reasons, a fact finder may infer that the decision was made for illegitimate reasons. It is in these instances that the *McDonnell Douglas-Burdine* model of analysis must be

employed." (Citation omitted; internal quotation marks omitted.) Id., 107; see also *Jones* v. *Dept. of Children & Families*, 172 Conn. App. 14, 24, 158 A.3d 356 (2017) (describing *McDonnell Douglas-Burdine* standard as " 'pretext' model of analysis"). "The *McDonnell Douglas-Burdine* analysis keeps the doors of the courts open for persons who are unable initially to establish a discriminatory motive. If a plaintiff, however, establishes a . . . prima facie case [under the mixed-motive model of analysis], thereby proving that an impermissible reason motivated a defendant's employment decision, then the *McDonnell Douglas-Burdine* model does not apply . . . ." *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 109.

The plaintiff in the present case alleged, inter alia, that (1) the defendant intentionally discriminated against her and "terminated [her] employment on account of her disability" and (2) the defendant "treated [her] adversely different from similarly situated employees . . . ."[11] Broadly construed; see *Doe* v. *Cochran*, 332 Conn. 325, 333, 210 A.3d 469 (2019); her complaint thus implicates both the mixed-motive and the *McDonnell Douglas-Burdine* pretext models of analysis. In its memorandum of decision, the trial court explicitly concluded that the plaintiff had not offered any proof "that her disability was 'a motivating factor' in the defendant's decision to terminate her" or that "her termination was pretextual." In so doing, the court determined that the plaintiff had not met her burden under either the mixed-motive or the *McDonnell Douglas-Burdine* model of analysis.[12] We, therefore, reject the plaintiff's contention

[11] In her complaint, the plaintiff defined her disability as chronic epilepsy.

[12] To the extent that the plaintiff complains that the trial court's discussion of those respective models of analysis was not exhaustive enough, we note that she did not seek an articulation of the court's judgment in any respect. See Practice Book § 66-5; see also *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 739 n.25, 937 A.2d 656 (2007) ("in the absence of an articulation . . . [an appellate court will] presume that the trial court acted properly").

that the court applied an improper legal standard in evaluating her claims of disability discrimination.

B

We next consider whether the court properly applied those legal standards. We begin with the plaintiff's claim that the "defendant terminated [her] because of her disability," which, she argues, entails an application of the mixed-motive model of analysis. Under that model, the plaintiff bears the initial burden of establishing a prima facie case by proving (1) "that he or she is within a protected class"[13] and (2) "that an impermissible factor played a 'motivating' or 'substantial' role in the employment decision."[14] *Levy* v. *Commission on Human*

[13] It is undisputed that the plaintiff is within a protected class under CFEPA due to her physical disability. See footnote 10 of this opinion.

[14] At times, the decisional law of this state has reflected a dichotomy with respect to the evidentiary framework involved in the mixed-motive and the *McDonnell Douglas-Burdine* pretext models of analysis. See, e.g., *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, 302 Conn. 263, 277, 25 A.3d 632 (2011) (*Price Waterhouse* mixed-motive standard applies "where there is direct evidence of discrimination" (internal quotation marks omitted)); *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 425, 944 A.2d 925 (2008) (describing *McDonnell Douglas-Burdine* model as "circumstantial evidence [framework]"); *Jacobs* v. *General Electric Co.*, supra, 275 Conn. 401 ("[e]mployment discrimination . . . can be proven either directly, with evidence that the employer was motivated by a discriminatory reason, or indirectly, by proving that the reason given by the employer was pretextual"). Our Supreme Court nonetheless has instructed that a plaintiff's burden under the mixed-motive model may be established "through direct . . . or circumstantial evidence . . . ." *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 105.

As the United States Court of Appeals for the Second Circuit observed, "we [previously] have equated direct evidence with evidence that shows that the impermissible criterion played some part in the decision-making process. . . . [The defendant] would have us define direct evidence as noncircumstantial evidence. But the basic problem with this touchstone is that direct evidence of intent cannot exist, at least in the sense of evidence which, if believed, would establish the ultimate issue of intent to discriminate. . . . Normally, direct evidence is described as evidence tending to show, without resort to inference, the existence of a fact in question. This is often contrasted with circumstantial, or indirect evidence, which requires the factfinder to take certain inferential steps before the fact in question is proved. But . . . all knowledge is inferential." (Citations omitted; internal quotation marks

Rights & Opportunities, supra, 236 Conn. 106. "Once the plaintiff has established [her] prima facie case, the burden of production and persuasion shifts to the defendant. [T]he defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [the impermissible factor] into account." (Footnote omitted; internal quotation marks omitted.) Id.

A plaintiff's initial burden under the mixed-motive model is not an insignificant one. "[T]he plaintiff's initial burden in a [mixed-motive] case is heavier than the de minimis showing required to establish a prima facie [case under the *McDonnell Douglas-Burdine* pretext model] . . . ." *Raskin* v. *Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997); accord *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir.) ("[i]n . . . a 'mixed-motives' case, the plaintiff must initially show more than the 'not onerous' *McDonnell Douglas-Burdine* factors"), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46 (1992); *Tyler* v. *Bethlehem Steel Corp.*, supra, 1186 (in

omitted.) *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46 (1992). The court continued: "Direct evidence, it seems, is an unfortunate choice of terminology for the sort of proof needed to establish a mixed-motives case. Direct and indirect describe not the quality of the evidence presented, but the manner in which the plaintiff proves his case. Strictly speaking, the only direct evidence that a decision was made because of an impermissible factor would be an admission by the decisionmaker such as I fired him because he was too old. Even a highly-probative statement like You're fired, old man still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision. But juries have always been allowed to draw such inferences." (Internal quotation marks omitted.) Id., 1185. The court thus clarified that the mixed-motive model of analysis "does not require . . . direct evidence of discriminatory animus (at least not in the sense of direct and circumstantial evidence). What *is* required is simply that the plaintiff submit enough evidence that, if believed, could reasonably allow a jury to conclude that the adverse employment consequences were because of an impermissible factor." (Emphasis in original; internal quotation marks omitted.) Id., 1187.

mixed-motives case, "the defendant need do nothing until the plaintiff has proved unlawful motivation" (internal quotation marks omitted)). A plaintiff in a mixed-motive case bears the "burden of showing that an illicit motive played a substantial factor in the termination decision . . . ." *Kirk* v. *Hitchcock Clinic*, 261 F.3d 75, 78 (1st Cir. 2001). To satisfy that burden, "a plaintiff must produce a smoking gun or at least a thick cloud of smoke to support [her] allegations of discriminatory treatment." (Internal quotation marks omitted.) *Serby* v. *New York City Dept. of Education*, 526 Fed. Appx. 132, 135 (2d Cir. 2013); see also *Morales* v. *Rooney*, 509 Fed. Appx. 9, 11 (2d Cir. 2013) (plaintiffs in mixed-motive case "were required to adduce evidence that did more than hint at the possibility of unfair treatment on account of [an impermissible factor]" (internal quotation marks omitted)).

The plaintiff in the present case has not met that burden. Nothing in the record before us suggests that the defendant terminated the plaintiff's employment due to her epilepsy. The notes of the January 8, 2019 investigatory interview indicate that the defendant's human resources director specifically asked the plaintiff if she understood that the defendant's alarm over the January 2, 2019 incident "has nothing to do with your epilepsy," to which the plaintiff replied, "Yes I do." The written disciplinary notice that the defendant furnished to the plaintiff likewise makes no mention of her disability generally or epilepsy specifically. Moreover, the record before us demonstrates that, once alerted to the plaintiff's epilepsy following her first seizure at work in the spring of 2018, the defendant proactively took a number of steps to accommodate that disability, as discussed more fully in part III of this opinion. We therefore conclude that the plaintiff has not raised a genuine issue of material fact as to whether

her disability played a substantial role in the defendant's decision to terminate her employment.

C

The trial court also concluded that the plaintiff failed to raise a genuine issue of material fact pursuant to the *McDonnell Douglas-Burdine* pretext model of analysis. We concur with that determination.

"[F]or the employee to first make a prima facie case of discrimination [under the *McDonnell Douglas-Burdine* model], the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . This burden is one of production, not persuasion; it can involve no credibility assessment. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision *actually* was motivated by illegal discriminatory bias." (Emphasis added; internal quotation marks omitted.) *Hartford Police Dept.* v. *Commission on Human Rights & Opportunities*, 347 Conn. 241, 257, 297 A.3d 167 (2023); see also *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 515, 43 A.3d 69 (2012) (after defendant articulates nondiscriminatory reason for employment action, "the burden is then on the plaintiff to prove by a preponderance of the evidence that the real reason for the disparate treatment was discrimination on the basis of membership in the protected class"); cf. *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 519, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) ("[i]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination" (emphasis in original)).

Assuming, arguendo, that the plaintiff can satisfy all four prongs of her initial burden, she still cannot prevail, as the defendant has stated a legitimate, nondiscriminatory reason for its decision to terminate her employment. It is undisputed that, following an investigation into the January 2, 2019 incident, the defendant concluded that the plaintiff had been impaired at work, in violation of the defendant's policies prohibiting employees from being under the influence of drugs in the workplace. The defendant communicated that nondiscriminatory reason to the plaintiff when it met with her on January 23, 2019, and memorialized it in its written disciplinary notice.[15] Because the defendant proffered a legitimate, nondiscriminatory justification for its decision to terminate the plaintiff's employment, the burden was on the plaintiff to demonstrate that this reason "is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Hartford Police Dept.* v. *Commission on Human Rights & Opportunities*, supra, 347 Conn. 257. The plaintiff failed to submit any evidence in that regard and does not argue on appeal that the aforementioned reason was pretextual.[16]

Furthermore, we note that the plaintiff's burden under the final step of the *McDonnell Douglas-Burdine*

[15] In that written disciplinary notice, the defendant stated in relevant part that, during the interview on January 8, 2019, the plaintiff "admitted that [she uses] medical marijuana and did show up to work impaired and that [she] may be abusing it. In addition, during multiple phone calls with the [Human Resources] Director, [she] did not deny showing up to work impaired." That notice further stated that the plaintiff violated "company rules" by reporting to work "impaired as [she] admitted . . . to another staff member" and then concluded: "In showing up to work while impaired [the plaintiff] violated the [applicable] standard of care . . . . [The plaintiff] failed to follow company policy and procedures; therefore, [her] employment with [the defendant] is being terminated, effective immediately."

[16] In her appellate brief, the plaintiff does not refute the court's conclusion that she failed to offer any proof that the defendant's stated rational for terminating her employment was pretextual and insists that "[t]his is not a pretext case."

pretext model "is the same as the plaintiff's initial burden" under the mixed-motive model.[17] *Tyler* v. *Bethlehem Steel Corp.*, supra, 958 F.2d 1185. In part II B of this opinion, we concluded that the plaintiff had not met her initial burden under the mixed-motive model of raising a genuine issue of material fact as to whether her disability played a substantial role in the defendant's decision to terminate her employment. For that reason, she likewise cannot satisfy her burden under the *McDonnell Douglas-Burdine* pretext model to raise a genuine issue of material fact that the real reason for her termination was discrimination on the basis of membership in a protected class. See *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 515. We therefore conclude that the court properly rendered summary judgment in favor of the defendant on the plaintiff's claim of disability discrimination.

III

The plaintiff also claims that the court improperly rendered summary judgment on the second count of her complaint, in which she alleged that the defendant failed to accommodate her disability in violation of § 46a-60 (b) (1). We disagree.

Section 46a-60 (b) (1) requires employers to reasonably accommodate an employee's disability. See *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 415, 944 A.2d 925 (2008). "In order to survive a motion for summary judgment on a reasonable accommodation claim, the

[17] Under the mixed-motive model of analysis, the plaintiff's initial burden requires proof "that an illicit motive played a substantial factor in the [employment] decision . . . ." *Kirk* v. *Hitchcock Clinic*, supra, 261 F.3d 78. Under the final step of the *McDonnell Douglas-Burdine* pretext model, the plaintiff's burden in opposing a defendant's motion for summary judgment is to present evidence that the employment decision "actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Hartford Police Dept.* v. *Commission on Human Rights & Opportunities*, supra, 347 Conn. 257.

plaintiff must produce enough evidence for a reasonable jury to find that (1) [she] is disabled within the meaning of the [statute], (2) [she] was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonably accommodate it. . . . If the employee has made such a prima facie showing, the burden shifts to the employer to show that such an accommodation would impose an undue hardship on its business." (Citations omitted; internal quotation marks omitted.) Id., 415–16.

The plaintiff concedes that she did not inform the defendant of her epilepsy disability until she suffered her first seizure at work in the spring of 2018. The undisputed evidence shows that the defendant thereafter proactively implemented a number of accommodations, including adoption of a medical alert protocol titled "Alyssa Bartolotta Medical Alert—Seizure—Partial Complex," which documented seizure symptoms, protocols, and emergency contacts for the plaintiff.[18] The defendant also allowed the plaintiff, in her discretion, to leave for the day whenever she experienced a seizure. In addition, the defendant transferred the plaintiff to a different classroom to ensure that she would be accompanied by a teacher or another teaching assistant at all times, and evenings in particular. In her deposition testimony, the plaintiff admitted that this transfer was an accommodation that the defendant provided for her safety, as well as the safety of students. Those accommodations undoubtedly were reasonable measures taken by the defendant upon learning of the plaintiff's disability, and the plaintiff has not argued otherwise in this appeal.

[18] A copy of that protocol was posted on the nurse's desk "so that staff knew who to contact and how to respond when [the plaintiff] had a seizure" in the workplace.

Instead, she alleges that the defendant improperly denied two distinct requests for accommodation purportedly made by the plaintiff on October 8, 2018, and January 15, 2019, respectively. We address each in turn.

A

We begin with the plaintiff's contention that the defendant improperly denied her request for an accommodation on October 8, 2018. At that time, the plaintiff provided the defendant with a note from her physician, which requested that the defendant (1) store Valium in the nurse's office and (2) have the nurse administer it to the plaintiff in the event that she had a seizure at work.[19] In her deposition testimony, the plaintiff explained that this note constituted an accommodation request "for the nurse to hold a few doses of Valium locked up somewhere safe, and then for me to lay down for [thirty] minutes to an hour, rest, and then hop back up and go back to my classroom . . . ."

In a sworn affidavit submitted in support of the defendant's motion for summary judgment, Sherer explained that the defendant had a nurse at the facility only two days each week. Moreover, that nurse was not permitted to administer medications to staff, as such activities exceeded the scope of her employment with the defendant. For that reason, the defendant denied the plaintiff's request in part. At the same time, the defendant did not prohibit the plaintiff from having Valium at

[19] The record before us does not contain a copy of that note from the plaintiff's physician. It nevertheless is undisputed that the plaintiff submitted that note to the defendant on October 8, 2018, as the defendant admitted in its answer to the plaintiff's complaint. Moreover, in support of its motion for summary judgment, the defendant furnished a report dated October 15, 2018, from Erazo to Goodison regarding the note that the defendant received from the plaintiff's physician, which states in relevant part: "[The] note includ[ed] a list of the plaintiff's medications. The note stated that if the plaintiff 'were to have a seizure at work, please send her to the nurse's office. The nurse can administer the Valium. Please allow her to rest in the nurse's office for [thirty to sixty] minutes.' "

the facility, as the plaintiff conceded in her deposition testimony.[20] Rather, the defendant simply denied the plaintiff's request to have the part-time nurse serve as the custodian thereof.

On appeal, the plaintiff maintains that the defendant's denial of her October 8, 2018 accommodation request violated her rights under § 46a-60 (b) (1). In response, the defendant argues, inter alia, that this claim is time barred, as the conduct in question occurred outside the 180 day limitation period contained in General Statutes (Rev. to 2017) § 46a-82 (f).[21] We agree with the defendant.

Pursuant to § 46a-82 (f), any person claiming to be aggrieved by an alleged discriminatory practice is required to file a complaint with the commission "within one hundred and eighty days after the alleged act of discrimination . . . ." As our Supreme Court has held, compliance with that time limit is mandatory unless "waiver, consent, or some other compelling equitable tolling doctrine applies." *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 284, 777 A.2d 645 (2001). In the present case, the plaintiff filed her complaint with the commission on May 29, 2019. Any allegation of a discriminatory practice that occurred prior to November 30, 2018, therefore, is barred by that statute of limitations.

It is undisputed that both the plaintiff's request for an accommodation to store Valium at the facility and

[20] In her deposition testimony, the plaintiff stated that Erazo instructed her to keep her Valium in her purse while at the facility and admitted that she was never told that she could not have her Valium at work.

[21] All references to § 46a-82 (f) in this opinion are to the 2017 revision of that statute, which the defendant pleaded as a special defense. In moving for summary judgment on the plaintiff's failure to accommodate claim, the defendant alternatively argued that her claim was time barred and that it failed on its merits and has renewed both arguments in its appellate brief in this appeal.

the defendant's response thereto occurred in October, 2018. Moreover, the plaintiff has not alleged that waiver, consent, or some other compelling equitable tolling doctrine applies to that accommodation request. Accordingly, her claim with respect to that request is barred by the statute of limitations contained in § 46a-82 (f).

B

The plaintiff also claims that the defendant improperly denied what she refers to in her appellate brief as her "medical marijuana accommodation request." We do not agree.

First and foremost, the plaintiff has presented no evidence that she made such a request of the defendant. As she acknowledged in her complaint and deposition testimony, she did not disclose her use of medical marijuana to the defendant until January 8, 2019. See footnote 7 of this opinion. Although she furnished a letter from her physician on January 15, 2019, the physician did not recommend or request that the defendant provide any accommodations to the plaintiff. Rather, the physician simply stated: "[The plaintiff] has a medical card to use medical marijuana for anxiety and seizures. She uses a vapor at 8PM daily (2–4 puffs). If you have any questions or concerns, please don't hesitate to call." Furthermore, the plaintiff was asked during her deposition "[w]here in [her] request for accommodation is there any reference at all to medical marijuana," to which she replied: "There isn't." The plaintiff also was asked if "there [was] anything else other than [denying the request] to maintain custody of your Valium in the nurse's office, is there anything else that we did not accommodate from your request for accommodation?" The plaintiff answered, "No." On the record before us, we cannot conclude that the plaintiff requested an accommodation for her medical marijuana use.

In addition, it is unclear what—if any—accommodation the defendant could make with respect to the plain-

tiff's use of medical marijuana short of allowing her to appear impaired in the workplace. The plaintiff's medical marijuana prescription called for her to take between two and four "puffs" of medical marijuana every day at 8 p.m. In her deposition testimony, the plaintiff explained that, when she took the medication as directed, she would not become impaired and that she would never depart from those directions.

To the extent that the plaintiff is suggesting that the defendant should permit her to disregard the directions on her medical marijuana prescription to allow her (1) to use it during the workday or (2) to appear at the facility in an impaired state, she has provided no legal authority that supports that bold proposition. In this regard, we reiterate that the act expressly provides that "[n]othing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours." General Statutes § 21a-408p (b) (3).

The sole case relied on by the plaintiff is *Stewart* v. *Snohomish County PUD No. 1*, 262 F. Supp. 3d 1089 (W.D. Wn. 2017), aff'd, 752 Fed. Appx. 444 (9th Cir. 2018), a federal case applying the state law of Washington. In her appellate brief, the plaintiff notes that "the trial court's decision makes no mention of the *Stewart* case." For three reasons, that silence is understandable.

First, because *Stewart* involves the proper application of Washington state law, it is both inapposite and nonbinding authority. Second, that case is factually distinct from the present case in several respects. *Stewart* involved a plaintiff who took prescription medication *during* the workday to treat an existing disability and whose physician provided a letter to the defendant employer explaining that the plaintiff was " 'able to

work without restrictions' " after the medication was administered. Id., 1094, 1097. By contrast, the plaintiff here was not directed to take medical marijuana during the workday, but rather was prescribed to take it at 8 p.m. each day. Moreover, unlike the plaintiff in *Stewart*, the plaintiff in the present case did not inform her employer that she was under such treatment and did not provide any communication from her treating physician indicating that she could work without restriction after taking medical marijuana during the day. In addition, the plaintiff in *Stewart*, who worked as a customer service representative at a utility company; id., 1093; performed markedly different duties. Whereas the plaintiff in *Stewart* primarily assisted "customers in person or over the phone with issues with their public utility services and billing"; id.; the plaintiff here was entrusted with the care of approximately twenty preschool children in a classroom setting. Indeed, her employment as a teaching assistant required satisfaction of certain statutory prerequisites, which speaks to the gravity of her position. See, e.g., *Friedenberg* v. *School Board of Palm Beach County*, 911 F.3d 1084, 1098 (11th Cir. 2018) ("[O]ur schools have a singular custodial and tutelary responsibility for our nation's most precious resource—our children. . . . Our teachers . . . are directly given the responsibility to ensure the safety and protection of our children. Each family sending a child into the care and custody of [a school] is counting on [its] teachers not only to educate them, but to keep them safe. It is to them that we look to safeguard the classroom and protect our students.").

Third, and perhaps most significantly, the District Court in *Stewart* found that, although the plaintiff in that case had "exhibited signs of impairment at work"; *Stewart* v. *Snohomish County PUD No. 1*, supra, 262 F. Supp. 3d 1096; the defendant had not shown that "the effects of [her] medication . . . prevented her

from properly performing her job" as a customer service representative. Id., 1104. In the present case, the plaintiff never has suggested that she can properly perform her job as a preschool teaching assistant while impaired by the use of medical marijuana.

In light of the foregoing, we conclude that no genuine issue of material fact exists as to whether the plaintiff made a medical marijuana accommodation request or whether the defendant violated § 46a-60 (b) (1) by denying such a request. The court, therefore, properly rendered summary judgment on the second count of the plaintiff's complaint.

IV

As a final matter, the plaintiff claims that the court improperly concluded that no genuine issue of material fact exists as to whether the defendant violated § 31-51x by requiring her to take a drug test on January 8, 2019. She contends that the defendant lacked a reasonable suspicion to do so. We disagree.

Section 31-51x provides in relevant part: "(a) No employer may require an employee to submit to a urinalysis drug test unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance. . . ." That statute, "in plain language, prohibits an employer from requiring an employee to submit to a urinalysis drug test without reasonable suspicion." *Tomick* v. *United Parcel Service, Inc.*, 135 Conn. App. 589, 608–609, 43 A.3d 722, cert. denied, 305 Conn. 920, 47 A.3d 389 (2012).

Neither the General Statutes nor any state regulation defines the term "reasonable suspicion" as it is used in § 31-51x. In *Poulos* v. *Pfizer, Inc.*, 244 Conn. 598, 606, 711 A.2d 688 (1998), our Supreme Court explained that § 31-51x "was enacted as part of a comprehensive

legislative plan regulating workplace drug testing" and "was intended to provide the same protections to private employees in Connecticut as those protections that are afforded to employees of the federal government by the fourth amendment to the United States constitution." The court further opined that "the issue of voluntary consent to drug testing under § 31-51x should be resolved in a manner consistent with federal fourth amendment constitutional law." Id., 606–607. In his concurring opinion, Justice McDonald emphasized that, under established fourth amendment jurisprudence, "[r]easonable suspicion is a lesser standard . . . than probable cause. . . . The collective knowledge of the employer should determine reasonable suspicion for the drug testing." (Citations omitted; internal quotation marks omitted.) Id., 619 (*McDonald*, *J.*, concurring).

Guided by that precedent, it is appropriate to look to the criminal context in ascertaining the applicable standard for reasonable suspicion. In that context, our Supreme Court has observed that "[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content [from] that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable to show probable cause. . . . Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion. . . . [I]n justifying [a] particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Citation omitted; internal quotation marks

omitted.) *State* v. *Lewis*, 333 Conn. 543, 569, 217 A.3d 576 (2019).

In her appellate brief, the plaintiff submits that "[i]t is undisputed that the defendant lacked reasonable suspicion on January 8, the day it ordered the plaintiff to submit to drug testing." We disagree.

Prior to January 8, 2019, the defendant had no knowledge of the plaintiff's medical marijuana use. Shortly after the January 2, 2019 incident transpired, Doty notified Licki and Erazo of her concern that the plaintiff "was not okay to be in the classroom with the children because she was still feeling the effects of the marijuana." In response, the defendant opened an investigation into the allegations of drug use by the plaintiff. As part of that investigation, Goodison interviewed Licki, the teacher who worked with the plaintiff on a daily basis. Licki informed her that, for approximately two weeks prior to the January 2, 2019 incident, she observed the plaintiff "to be forgetful, droopy, and unsteady on her feet." Licki at that time expressed concern regarding the safety of children in the plaintiff's care. The defendant also received a letter from Badenhop, who stated that, on January 3, 2019, the plaintiff told him that "she was on medical marijuana."

On January 8, 2019, Goodison and Erazo met with the plaintiff to discuss the report that she was impaired in the workplace. At that time, the plaintiff for the first time notified the defendant that she used medical marijuana. Moreover, as Sherer noted in her affidavit, "[d]uring [that] interview . . . [the plaintiff] admitted that she reported to work impaired and said the cause was taking too much medical marijuana." The notes of that interview similarly state in relevant part: "When presented with the allegations of what was reported [by Doty] . . . [the plaintiff] did not deny showing up to work impaired and stated: 'I use a disposable vape pen

which gives [between fifty and seventy] puffs [of medical marijuana]. I wasn't keeping track and I believe the pen ran out. I take it at [8 p.m.]. . . . It is supposed to wear off within [eight] hours and I take it right after I take the Valium and other seizure medication. There is a possibility I may have used too much [and] more than prescribed [because] I ran out and had [two] seizures the following day. I am prescribed [four] puffs at [a] time."

The interview notes also contain the following colloquy between the plaintiff and Erazo:

"[Erazo]: Do you understand that you cannot show up to work impaired because the children require full attention and if you are impaired you are unable to respond quickly to their needs?

"[The Plaintiff]: Yes, I understand, and I thought [the marijuana] would have worn off by then. My mother is [going to] kill me and I'm mad at myself because I knew I should have told you guys. . . . You guys have been so nice and accommodating and I messed up."

In light of (1) the observations of the plaintiff in the preschool workplace by Doty and Licki, (2) the letter from Badenhop, (3) the plaintiff's disclosure during the investigatory interview that she used medical marijuana, (4) the plaintiff's admission during that interview that she reported to work impaired, (5) the plaintiff's statement that she may have taken too much medical marijuana prior to the January 2, 2019 incident, and (6) her statement that she "messed up," we agree with the trial court that no genuine issue of material fact exists as to whether the defendant had a reasonable suspicion to require the plaintiff to take a drug test following her investigatory interview on January 8, 2019. A reasonable person armed with that information would suspect that the plaintiff was under the influence of drugs in the

classroom, which could adversely affect her job performance. The court, therefore, properly rendered judgment on the fourth count of the plaintiff's complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

MELVIN DELGADO *v.* COMMISSIONER OF CORRECTION (AC 45982)

Moll, Clark and Seeley, Js.

Syllabus

The petitioner sought relief in a third petition for a writ of habeas corpus, claiming that P, his counsel during his second habeas action, had provided ineffective assistance by failing to raise claims of ineffective assistance against G, the petitioner's criminal trial counsel, and D, his counsel on direct appeal from his conviction. The petitioner had been convicted, after a jury trial, of murder as an accessory as a result of a gang related argument during which he and another individual shot at the unarmed victim as he was attempting to flee. The petitioner gave a statement to the police in which he admitted shooting the victim and claimed that the victim had reached toward the front of his waist as if he were about to pull out a gun. The petitioner did not indicate in the statement that he saw an actual weapon. Having determined that the evidence was lacking to support a defense of self-defense and that the outcome of the trial hinged on the petitioner's statement to the police, G decided not to request a jury instruction on self-defense and instead employed a trial strategy of attacking the credibility of the police involved in the petitioner's arrest and discrediting the statement's reliability while highlighting facts about the petitioner that might appeal to the jurors' sympathy. Thereafter, the court instructed the jury on the charge of murder, a specific intent crime. Although the court initially read the murder statute (§ 53a-54a (a)), which contained language requiring the specific intent to cause the victim's death, it also read the entire statutory (§ 53a-3 (11)) definition of intent, which included language on both specific intent and general intent to engage in conduct. The habeas court rendered judgment denying the petition for a writ of habeas corpus, concluding that the petitioner had not established that either G or D had rendered ineffective assistance, and, thus, that he could not prevail on his ineffective assistance claims against P. The court granted the

petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that P rendered ineffective assistance when he failed to raise a claim that G had rendered deficient performance when she declined to request a self-defense instruction at the criminal trial: G's decision was a matter of sound trial strategy, as a defense of self-defense was inconsistent with the evidence that the unarmed victim was shot from behind as he was fleeing, and G was unable to find a witness or other evidence to corroborate the petitioner's belief that the victim was reaching for a weapon at the time of the shooting; moreover, G sought to have the jury consider only secondarily that the petitioner may have acted in self-defense and made the tactical decision to afford the jury two pathways to find the petitioner not guilty of murder without foreclosing the reasonable and well supported strategy of attacking the credibility of his statement to the police, as G's main objective was to discredit the statement in an attempt to persuade the jury to disregard evidence that was key to the state's case while her secondary objective was to suggest that, if the jury were to believe the petitioner's statement, it also might believe that he acted in self-defense when he shot at the victim.

2. The habeas court correctly rejected the petitioner's ineffective assistance claims against P concerning the trial court's jury instruction on the intent element of murder, as the petitioner was not prejudiced by G's failure to object to the instruction, and D did not improperly fail to raise the issue on direct appeal:

   a. Although G rendered deficient performance when she failed to object to the intent instruction, the record in its entirety, including the petitioner's incriminating statement to the police and the corroborating physical evidence presented by the state, showed that the petitioner failed to demonstrate a substantial likelihood that the outcome of his criminal trial would have been different had G objected to the instruction: although the court incorrectly read the entire definition of intent in § 53a-3 (11), it repeatedly referenced the specific intent language when it thereafter instructed the jury on the lesser included offense of manslaughter in the first degree with a firearm and on accessorial liability as it applied to the murder charge and to manslaughter; moreover, the court correctly distinguished the intent elements of manslaughter and accessory to manslaughter from the specific intent language of the murder charge and accessory to murder, and, by stressing and emphasizing the differences between the elements of the offenses under which the petitioner could be found guilty, the court eliminated any risk of confusion that could have been caused by its improper prior instruction on intent to commit murder, and, thus, it was not reasonably possible that the jury was misled by the incorrect instruction on the element of intent.

   b. P did not render ineffective assistance by failing to claim that D improperly failed to raise the issue of the incorrect intent instruction

on direct appeal, this court having previously determined, on the basis of its review of the merits of the underlying claim, that it was not reasonably probable that the petitioner would have prevailed on direct appeal.

Argued November 14, 2023—officially released March 19, 2024

Procedural History

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

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

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

Opinion

MOLL, J. The petitioner, Melvin Delgado, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that his criminal trial counsel, Attorney Kimberly Graham, and his appellate counsel, Attorney Theresa M. Dalton, did not render ineffective assistance during the criminal proceedings underlying his conviction or in the direct appeal from his conviction, respectively, a conclusion that necessarily defeated the petitioner's claims of ineffective assistance of counsel directed at his second habeas counsel, Attorney Laljeebhai R. Patel. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts, as set forth by our Supreme Court in the petitioner's direct appeal from his criminal conviction; see *State* v. *Delgado*, 247 Conn. 616, 725 A.2d 306 (1999); or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. "On the evening of December 20, 1994, the [petitioner], a member of the Los Solidos street gang, was socializing with friends at a party in an apartment in Hartford's Dutch Point housing project (Dutch Point). A fellow Los Solidos gang member, identified only by the nickname 'Cheesecake,' also was present at the party. Late in the evening, the [petitioner], who was carrying a nine millimeter pistol, left the party and went to meet Cheesecake at a nearby store located at 63 Norwich Street. Cheesecake was armed with a .38 caliber revolver.

"Shortly after midnight, while he was walking from Dutch Point to the store, the [petitioner] encountered the victim, Anthony Battle, near the intersection of Stonington and Norwich Streets. The [petitioner] recognized the victim as a member of Twenty Love, a rival gang with which the Los Solidos gang was at war. The [petitioner] approached the victim from the Stonington Street side of the intersection, and the two men engaged in a heated argument. The [petitioner], who at this time was approximately fifteen to twenty feet from the victim, drew his pistol and began firing at the victim. While the [petitioner] was shooting at the victim, Cheesecake, who was standing at the Norwich Street side of the intersection, also opened fire on the victim. The [petitioner] and Cheesecake continued to shoot at the victim as he attempted to flee. After firing thirteen rounds, the [petitioner] watched as the wounded victim climbed a fence and escaped into a nearby park. Thereafter, the [petitioner] and Cheesecake left the scene separately.

"Within minutes, two Hartford police officers arrived at the scene of the shooting and found the victim lying on the ground in intense pain. He had been shot twice,

once in the back of the right leg and once in the back of the right arm. The victim told the officers that he had been shot by members of Los Solidos and that at least one of the shooters was Hispanic. The victim was transported to Hartford Hospital, where he subsequently died from loss of blood caused by his gunshot wounds." Id., 619–20.

The petitioner subsequently was arrested and charged with murder in violation of General Statutes § 53a-54a[1] and with possession of a firearm during the commission of a class A, B or C felony in violation of General Statutes § 53-202k.[2] Following a jury trial, during which the petitioner was represented by Graham, the petitioner was convicted of being an accessory to murder in violation of General Statutes §§ 53a-8[3] and 53a-54a, and of possession of a firearm during the commission of a class A, B or C felony in violation of § 53-202k. See id., 618. The petitioner was sentenced to a

[1] General Statutes § 53a-54a (a) provides: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

[2] General Statutes § 53-202k provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

[3] General Statutes § 53a-8 (a) provides: "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

total effective sentence of sixty-five years of imprisonment. Id., 634. Thereafter, the petitioner, represented by Dalton, appealed from the judgment of conviction directly to our Supreme Court pursuant to General Statutes (Rev. to 1997) § 51-199 (b). Id., 618 n.3. On direct appeal, our Supreme Court affirmed the judgment of conviction as to the accessory to murder charge but vacated the judgment of conviction with respect to the firearm charge to reflect the fact that § 53-202k does not constitute a separate offense.[4] See id., 634.

In 2004, following the disposition of his direct appeal, the petitioner commenced his first habeas action, in which he was represented by Attorney Robert J. McKay (first habeas counsel). In an amended petition for a writ of habeas corpus dated February 9, 2007, the petitioner asserted, inter alia, that Graham and Dalton had rendered ineffective assistance as criminal trial counsel and appellate counsel on direct appeal, respectively. Following a trial, the habeas court, *Fuger*, *J.*, denied the amended habeas petition. Upon the habeas court's denial of certification to appeal from the judgment denying his amended habeas petition, the petitioner appealed to this court, which dismissed the appeal. See *Delgado* v. *Commissioner of Correction*, 114 Conn. App. 609, 618, 970 A.2d 792, cert. denied, 292 Conn. 920, 974 A.2d 721 (2009).

In 2009, the petitioner commenced a second habeas action. In an amended petition for a writ of habeas corpus dated March 22, 2011, the petitioner, represented by Patel, asserted that McKay had rendered ineffective assistance as prior habeas counsel. Following a trial, the habeas court, *Bright*, *J.*, denied the amended habeas petition and the ensuing petition for certification

[4] Our Supreme Court remanded the case to the trial court with direction to vacate the conviction as to the firearm charge and "to resentence [the petitioner] to a total effective term of imprisonment of sixty-five years . . . ." *State* v. *Delgado*, supra, 247 Conn. 634.

to appeal, whereupon the petitioner, on July 25, 2011, appealed to this court. On March 19, 2014, this court dismissed the appeal. See *Delgado* v. *Commissioner of Correction*, Connecticut Appellate Court, Docket No. AC 33706 (appeal dismissed March 19, 2014).

Meanwhile, in 2013, during the pendency of the appeal from the judgment rendered in the second habeas action, the petitioner commenced a third habeas action, which underlies the present appeal. In an amended petition for a writ of habeas corpus dated July 10, 2020 (operative petition), the petitioner asserted four counts of ineffective assistance of counsel, of which only counts one, three, and four are relevant to this appeal.[5] In counts one and three, the petitioner alleged that Patel had rendered ineffective assistance by failing to raise claims of ineffective assistance against McKay for failing to assert certain claims that Graham had rendered ineffective assistance during the criminal trial. Specifically, the petitioner alleged that Graham had rendered ineffective assistance because she failed (1) to request a self-defense jury instruction and (2) to object to an erroneous intent instruction articulated by the trial court on the murder charge. In count four, the petitioner alleged that Patel had rendered ineffective assistance by failing to raise the claim that McKay had rendered ineffective assistance when he failed to assert that Dalton had rendered ineffective assistance on direct appeal by failing to raise the issue of the erroneous intent instruction. The respondent, the Commissioner of Correction, filed a return and various special defenses.

[5] In count two of the operative petition, the petitioner alleged that Patel had rendered ineffective assistance by not raising the claim that McKay had rendered ineffective assistance by failing to assert that Graham had rendered ineffective assistance when she failed to move to suppress the petitioner's statement to the police as fruit of the poisonous tree. The habeas court, *Oliver*, *J.*, rendered judgment in favor of the respondent, the Commissioner of Correction, on count two. The petitioner is not challenging on appeal this portion of the judgment.

The matter was tried to the habeas court, *Oliver*, *J.*, on June 7, 2021, and April 28, 2022. The court admitted various exhibits, including copies of transcripts from the petitioner's criminal trial, and heard testimony from witnesses, including Patel, McKay, Graham, Dalton, and Attorney John R. Gulash, the petitioner's legal expert.

On September 14, 2022, the court issued a memorandum of decision denying the petitioner's operative petition. In addressing the issue of the self-defense instruction vis-à-vis count one, the court concluded that the petitioner had failed to prove that Graham's performance was deficient under the first part of the test for ineffective assistance of counsel set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Regarding the issue of the intent instruction raised in count three, although the court found that Graham had rendered deficient performance by failing to object to that instruction, it concluded that the petitioner had not satisfied the second part of the *Strickland* test by establishing that he was prejudiced as a result of Graham's deficient performance. With regard to count four, predicated on the allegation that Dalton had rendered ineffective assistance on direct appeal by failing to claim that the trial court's jury instruction on intent was improper, the habeas court determined that the petitioner had failed to satisfy either the performance prong or the prejudice prong under *Strickland*. As the court further explained, its conclusions that Graham and Dalton did not render ineffective assistance were dispositive of the claims against Patel set forth in counts one, three, and four. Thereafter, the petitioner filed a petition for certification to appeal, which the court granted. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before turning to the petitioner's claims, we set forth the well settled standard of review governing challenges

to a habeas court's judgment on ineffective assistance of counsel claims. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . In a habeas trial, the court is the trier of fact and, thus, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony . . . . It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court. . . .

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

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . .

"It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test],

whichever is easier. . . . [T]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Citations omitted; internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, 222 Conn. App. 713, 722–23, 306 A.3d 1073 (2023), cert. denied, 348 Conn. 953, A.3d (2024).

"Our Supreme Court, in *Lozada* v. *Warden*, [223 Conn. 834, 843, 613 A.2d 818 (1992)], established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing . . . a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Our Supreme Court subsequently expanded *Lozada*'s holding to encompass third habeas petitions challenging the performance of second habeas counsel. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with [*Strickland*] both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . .

"Simply put, a petitioner cannot succeed . . . on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised." (Citations

omitted; internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 585–86, 300 A.3d 607, cert. denied, 348 Conn. 911, 303 A.3d 10 (2023).

On appeal, the petitioner claims that the habeas court improperly rendered judgment in the respondent's favor on counts one, three, and four of the operative petition, which asserted ineffective assistance of counsel claims against Patel predicated on the derivative allegations that Graham and Dalton had rendered ineffective assistance during the criminal trial and on direct appeal, respectively. For the reasons that follow, we disagree.

I

The petitioner first claims that the habeas court improperly rendered judgment in the respondent's favor on count one of the operative petition, in which the petitioner asserted an ineffective assistance of counsel claim as to Patel predicated in relevant part on the allegation that Graham had provided ineffective assistance by failing to request a jury instruction on self-defense. The petitioner asserts that the court incorrectly concluded that he had failed to satisfy the performance prong under *Strickland*. In support of his claim, the petitioner argues that (1) it was possible to raise the defense of self-defense at his criminal trial, even if it contradicted Graham's assertion of a purported "nullification" defense, (2) Graham's attempt to appeal to the jurors' sympathy by convincing them to disregard the petitioner's statement to the police was not a valid legal defense, and (3) Graham's suggestion during closing argument that the petitioner may have been acting in self-defense during the shooting—without a corresponding instruction on self-defense—likely confused the jury. We conclude that the court correctly determined that the petitioner did not satisfy *Strickland*'s

performance prong and, therefore, properly rendered judgment in the respondent's favor on count one.[6]

The following additional facts, as set forth by our Supreme Court in its decision on the petitioner's direct appeal, or as undisputed in the record, and procedural history are relevant to the petitioner's first claim. On the night of his arrest, the petitioner provided police with a statement in which he admitted to shooting the victim (statement). *State* v. *Delgado*, supra, 247 Conn. 622–23. The statement, which was admitted in full during the petitioner's criminal trial, as well as during the habeas trial in the present action, included the following: "I thought this black boy (20 Lover) was talkin shit as he reached like into the front of his waist like he was about to pull out a piece (gun) on me as I pulled out my 9 (millimeter handgun) and just started buckin at the black boy like 12 or 13 times. I heard another gun buckin at the same time like over by the store (CBL STORE 63 Norwich St.) and I heard like 5 or 6 shots. I remember when we was buckin (shooting) at the black boy he was like running [across] the street (Stonington St.) towards the park (Colt's Park) and I think one of my shots hit him cause like when I was buckin (shooting) he fell over the fence but Miguel 'Cheese Cake' could have hit him too cause we was both buckin at the same time, but I think I got him!"

During the habeas trial in the present action, Graham testified that the defense strategy was (1) to discredit the petitioner's statement, and (2) to appeal to the jurors, in a manner she characterized as "jury nullification," by highlighting mitigating factors with which the jurors could sympathize. The defense "relied primarily on the testimony of friends and family members who

[6] The petitioner further contends that he was prejudiced by Graham's purported deficient performance. Because we conclude that the habeas court properly determined that Graham's performance was not deficient, we need not address *Strickland*'s prejudice prong.

were with [the petitioner] on the night of his arrest to support his contention that he was drunk and high that evening. He claimed that as a result of his intoxication, his statement to the police concerning the shooting was unreliable." *State* v. *Delgado*, supra, 247 Conn. 629.

In addition, Graham testified during the habeas trial that she wanted the jury to consider secondarily the concept of self-defense. During his closing argument, the prosecutor remarked that "[on] the night of the murder . . . the [petitioner] happens upon [the victim] . . . . Words are exchanged. . . . At that point, the [petitioner] thinks . . . the victim is going to pull out a gun. [The petitioner] [p]ulls out his gun. And in his words, he . . . [s]tarted buckin' at the black boy, like twelve or thirteen times." At the outset of her closing argument, Graham stated: "I'd like to . . . address some of the points that [the prosecutor] brought up in his argument. . . . What the [petitioner's] statement goes on to indicate is some type of self-defense argument. . . . What the evidence shows, if you choose to believe th[e] [petitioner's] statement, is that there were words had . . . between [the petitioner] and [the victim]. And that would have been—[the petitioner] believed that someone was pulling a gun out, that [the victim] was pulling a gun out, and he fired in self-defense. That's if you believe the statement. But, I submit to you that this statement should not be believed. And I will go on as to why." Graham primarily challenged the circumstances of the case and attacked the credibility of the statement throughout the remainder of her argument. Following the conclusion of closing arguments and outside the presence of the jury, the court commented that Graham had referred to self-defense during her argument and asked if she wanted the court to give a jury instruction on self-defense, which she declined. Graham testified that she declined

a self-defense jury instruction because she did not believe it would be helpful to the defense case.

In its decision, the habeas court stated that "[a]t the habeas trial . . . Graham said that the defense theory was jury nullification. The state's case hinged on the petitioner's statement to the police. . . . Graham unsuccessfully sought to suppress the statement, in which the petitioner admitted to shooting the victim, and concluded that it was likely that the petitioner was going to be convicted based on his statement. . . . Graham strove to affect the jury by highlighting the petitioner's age—sixteen at the time of the offense and eighteen at the time of the criminal trial—and other factors to appeal to the jurors. Those other factors included the police interviewing the petitioner without a parent present or consenting to the interview, as well as his drug and alcohol use at a tender age. . . . Graham's efforts to humanize the petitioner were intended to convince the jurors that they should disregard or throw out his confession because of all the circumstances surrounding the petitioner and the way his statement was taken. . . . Graham also attempted to attack the credibility of the police officers who took the statement and the reliability of the confession. . . .

"Graham investigated a self-defense claim but did not locate any witness or discover any evidence to corroborate the petitioner's indication that the victim moved in a way that could be interpreted as reaching for a weapon. To the contrary: the victim being shot in the back of his leg and arm supported the contention that he was fired upon as he was fleeing. . . .

"Graham tried to convince the [jurors] that if they believed the petitioner's confession, then they should also believe him when he said that the victim was reaching to his front as if he were getting ready to pull out

a gun. . . . Graham viewed this argument as supporting self-defense. Conversely, if the jury did not believe the petitioner's statement to the police, then the jury should not convict him. . . . [Graham's] main objective was to have the jury . . . not consider the petitioner's statement. The secondary objective, if the jury instead believed the statement, was to convince the jurors that they should also believe that the petitioner thought the victim was moving his arm toward his waist to get a gun. . . .

"Graham did not think that the petitioner would present well to the jury—he was angry, would say anything, and it was uncertain what he would testify to. Additionally . . . Graham did not want the petitioner to testify in support of self-defense because his statement to the police did not indicate that he saw an actual weapon. . . . Graham did not request an instruction on self-defense because she did not think that the jury would find that the petitioner had a reasonable belief that the victim was pulling a gun on him. If the [jurors] were instructed on self-defense, then they would be required to take a closer look at the specific evidence to determine if his belief that the victim had a gun was reasonable. . . . Graham viewed that as too risky for the defense and likely to fail.

"On cross-examination . . . Graham acknowledged that she was aware of all the issues that would arise if the jury were instructed on self-defense. For example, there is a duty to retreat, the use of force by the other person cannot be provoked, one cannot be the initial aggressor, one must reasonably believe that the attacker is about to use force, and one must reasonably believe that the use of deadly force is necessary to repel the attack. The facts of the petitioner's case—the victim was running away from two shooters; the victim was shot twice from behind; the petitioner never saw the victim with a gun; no gun was found on the victim or

in his vehicle—made it highly unlikely that self-defense would prevail." Accordingly, the court concluded that Graham had a reasonable basis for choosing to decline a self-defense instruction and that this decision was a matter of sound trial strategy. We agree with the habeas court's assessment of Graham's defense strategy.

The following additional legal principles are relevant to the petitioner's first claim on appeal. "[A] defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. That is, he merely is required to introduce sufficient evidence . . . [if credited by the jury] to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. . . .

"[T]o submit a [self-defense] defense to the jury, a defendant must introduce evidence that the defendant reasonably believed [the attacker's] unlawful violence to be imminent or immediate. . . . Under [General Statutes] § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that [the] attacker is using or about to use deadly force against [himself] and that deadly force is necessary to repel such attack. . . . The Connecticut test for the degree of force in self-defense . . . is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable. . . .

"As to whether the defendant had a reasonable belief that the attacker was using or was about to use deadly force, it is not enough for a defendant to fear the victim . . . . Rather, a defendant must introduce evidence that the defendant reasonably believed his adversary's unlawful violence to be imminent . . . . Evidence of imminent violence must be such that the jury must not

have to resort to speculation in order to find that the defendant acted in justifiable self-defense. . . .

"As to whether the defendant had a reasonable belief that deadly force was necessary to repel the attacker's use of deadly force, there are two essential parts [to this] necessity requirement, which are that force should be permitted only (1) when necessary and (2) to the extent necessary." (Citations omitted; internal quotation marks omitted.) *State* v. *Hargett*, 343 Conn. 604, 619–21, 275 A.3d 601 (2022).

As Graham recognized, the petitioner's statement, as well as the lack of evidence supporting a self-defense theory, presented significant challenges to the defense. Graham testified that the outcome of the petitioner's case "hinged upon [his] confession." Similarly, the respondent, in his appellate brief, acknowledged that "[t]he key piece of evidence against the petitioner was [the statement]." Graham employed a strategy in which she attempted to persuade the jury to disregard the evidence that was key to the state's case by attacking the credibility of the police officers involved in the petitioner's arrest and the reliability of the statement itself. At the same time, the statement "also contained [the petitioner's] indication that he thought that the victim was reaching toward the front of his waist as if the victim were about to pull out a gun on the petitioner." Although the petitioner's expert witness at the habeas trial, Gulash, testified that he saw "no basis for defense counsel to turn down the [criminal trial] court's invitation to give a self-defense instruction," Graham testified that she had investigated a possible defense of self-defense but was unable to find a witness or other evidence corroborating the petitioner's belief that the victim was reaching for a weapon. Because the physical evidence showed that the victim was shot from behind and was not carrying a weapon, it supported the contention that he was fired on as he was fleeing and

defenseless. In addition, Graham's testimony iterated that the petitioner "never saw a gun or . . . never said he saw a gun." For these reasons, Graham believed that a defense of self-defense was both unwinnable and detrimental to her preferred strategy, noting that a self-defense instruction would require the jury to scrutinize unfavorable physical evidence in order to determine whether the elements of self-defense were met.

The petitioner nevertheless argues that the unfavorable evidence is not dispositive of the issue, the state would not have overcome its burden of disproving self-defense beyond a reasonable doubt, and a self-defense instruction would have inspired the jury to reconsider the statement in a more favorable context in light of the elements of self-defense. As the habeas court stated, however, the effect of the statement on the defense strategy was to position Graham "literally between Scylla and Charybdis: her closing argument raised self-defense, but she did not want a self-defense instruction; the petitioner's statement should be disregarded completely by the jury, but it also was necessary to establish self-defense." Although we remain mindful of the fact that the jury was entitled to credit or discredit portions of the petitioner's statement in consideration of a self-defense claim; see, e.g., *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 311, 298 A.3d 636 (fact finders are "free to juxtapose conflicting versions of events and determine which is more credible" (internal quotation marks omitted)), cert. denied, 348 Conn. 915, 303 A.3d 603 (2023); the petitioner is required to show that Graham's decision to decline the instruction "fell below an objective standard of reasonableness as measured by prevailing professional norms" when "considering all of the circumstances . . . ." (Internal quotation marks omitted.) Id., 305. "[A] petitioner will not be able to demonstrate that trial counsel's decisions were objectively unreasonable unless there was no . . .

tactical justification for the course taken. . . . Further, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." (Citation omitted; internal quotation marks omitted.) Id., 313.

The physical evidence presented at the criminal trial indicating that the victim was fleeing and weaponless supports Graham's concerns that a self-defense instruction might have led the jury to afford more credit to the statement, wherein the petitioner described, for example, "[shooting] . . . at the black boy [while] he was like running [across] the street," or to lose sympathy for the petitioner. At the habeas trial, Graham testified that she presented the jury with self-defense as a secondary consideration, which addressed remarks the prosecutor made during his closing argument, while preserving the strategy she had employed throughout trial. Given that self-defense was inconsistent with the evidence presented in the case, her closing argument was a mechanism in which she made a tactical decision to afford the jury two potential pathways to find the petitioner not guilty of murder without foreclosing the reasonable and well supported defense strategy of attacking the credibility of the statement. We therefore cannot conclude that there was no tactical justification for Graham's decision to decline a self-defense jury instruction.

In sum, in light of our review of the record, we agree with the habeas court's conclusions under *Strickland* that Graham did not render deficient performance by declining a self-defense jury instruction and, therefore, that the petitioner's ineffective assistance of counsel claim against Patel in count one of the operative petition necessarily fails. Accordingly, we conclude that the

court properly rendered judgment in favor of the respondent on count one of the operative petition.

II

We next address the petitioner's claims that the habeas court improperly rendered judgment in the respondent's favor on counts three and four of the operative petition, in which the petitioner asserted ineffective assistance of counsel claims as to Patel predicated in relevant part on the allegations that (1) Graham had provided ineffective assistance by failing to object to the trial court's incorrect jury instruction on intent and (2) Dalton had provided ineffective assistance on direct appeal by failing to claim error as to that instruction. We do not agree.

A

The record reveals the following additional procedural history relevant to our disposition of this claim. At the petitioner's criminal trial, the court instructed the jury on both murder and, at the state's request, the lesser included offense of manslaughter in the first degree with a firearm. The court also instructed the jury that, if it did not find the petitioner guilty of either of those offenses, it could consider whether to find him guilty of, respectively, having been an accessory to murder or an accessory to manslaughter in the first degree with a firearm. With respect to the murder charge, the trial court's instructions to the jury in relevant part included the following:

"[The Court]: Now, the murder statute, as pertinent here, reads as follows: Person is guilty of murder when, with the intent to cause the death of another person, he causes the death of such person.

"There are three elements necessary for the state to prove beyond a reasonable doubt in order to warrant a conviction. First, was the death of [the victim] caused

by another? Second, was it caused by the [petitioner]? And, third, did the [petitioner] intend to cause the death? . . .

"As to the third element, a person acts intentionally, with respect to a result or to conduct, when his objective is to cause such result or to engage in such conduct. As you can see, we can't look into a mind of a person to determine their intent. And if the intent is to be determined at all, it must be determined from the circumstances surrounding that person's conduct or action.

"As to the nature of the evidence to present or consider here, as to the third element, is the number of shots that were fired. From the [petitioner's] statement, he indicated he fired twelve or thirteen shots. And of course, this is consistent with the thirteen shell casings that were picked up in the spot near the—[the victim's] back door.

"You may consider as well the length of time that the shooting took place on. And of course, the only way to estimate that is from the distance from the decedent's car; across the road, and across the grassy area to the fence, over the fence. And as I recall, the [petitioner's] statement was that, at that point, he thought he had hit the decedent. But, because Cheesecake was still firing . . . Cheesecake may've hit the decedent.

"If you find that the state has proved each of these elements to you beyond a reasonable doubt, then you must find the [petitioner] guilty as charged of murder. On the other hand, if you find that the state has failed to prove any one of these elements to you beyond a reasonable doubt, you must find him not guilty as to the charge of murder.

"However, if the element that you do not find to be proved beyond a reasonable doubt is the second, which is, was the death caused by the [petitioner], you may

consider whether or not he was an accessory to murder. And the statute, as applied to this case and pertinent to this case, reads as follows: A person acting with a mental state required for the commission of an offense, who intentionally aids another person to engage in conduct which constitutes an offense, shall be criminally liable for such conduct. And I've already defined for you intent from the statute. And it is the same that applies to the intent of this statute. And again, intent can only be determined, if determined at all, from the circumstances surrounding the actor or doer's conduct.

"Now, it is not enough that the [petitioner] committed acts which may in fact have aided the committing of the criminal act. One who is present when a crime is committed, but neither assists in its commission nor shares in its criminal intent, cannot be convicted as an accessory. Mere presence is not enough, nor passive acquiescence is not enough.

"To be an accessory, the [petitioner] must have criminal intent in community of unlawful purpose with the one who did the criminal act or caused the death.

"The question before you then is this: Did the [petitioner] intend to aid the person who caused [the victim's] death? And in so doing, did he intend to have the crime of murder committed? If you find that the state has proved that the [petitioner] intended to aid the person who caused the death, and in so doing, did intend to have the crime of murder committed, then you must find the [petitioner] guilty of being an accessory to murder. On the other hand, if the state has failed to so prove, you must find the [petitioner] not guilty of accessory to murder."

The petitioner asserts that the habeas court incorrectly concluded that he failed to satisfy the prejudice

prong[7] under *Strickland* with respect to his ineffective assistance of counsel claim set forth in count three. We conclude that the court correctly determined that the petitioner did not satisfy *Strickland*'s prejudice prong and, therefore, properly rendered judgment in the respondent's favor on count three.

In count three of the operative petition, the petitioner alleged in relevant part that Graham rendered ineffective assistance by failing to object to the trial court's instruction on the intent element of murder. In his posttrial brief to the habeas court, the petitioner maintained that the court at his criminal trial had improperly read the entire definition of intent set forth in General Statutes § 53a-3 (11) when instructing the jury on murder, a specific intent crime, and never properly defined "intent" throughout the remainder of the instructions. The petitioner further maintained that, "[i]n spite of noticing the [erroneous intent instructions] and understanding that this error would make it easier for the jury to convict the petitioner of murder, [Graham] still did not raise an objection to the instruction."

In its decision, the habeas court stated in relevant part that, "[a]lthough it may be relatively easy to conclude that . . . Graham was deficient for not objecting to the intent instruction . . . whether the petitioner was prejudiced arrives at a different conclusion. . . . The [trial] court . . . referred back to its initial definition of intent when it instructed the jury on the elements of accessory to murder. . . . However, the court also *distinguished* the intent element for manslaughter from that necessary for murder: '. . . you did not find that the state had proved the third element of murder, that is, that [the victim's] death was intended'; 'this differs

[7] The respondent concedes in his appellate brief that the habeas court properly concluded that Graham had rendered deficient performance by failing to object to the intent instruction.

from murder in that, in murder, the intent was to cause the person's death.' . . . The court again highlighted this distinction when instructing the jury on accessory to manslaughter . . . 'those instructions [for accessory to murder] are the same here, except for the state of the [petitioner's] mind, that he intended to cause serious physical injury, rather than intending to cause death.' . . . Th[is] court finds that it is not reasonably possible that the court's instruction on specific and general intent misled the jury. Viewing the jury charge in its entirety, it was clear that murder required the specific intent to cause [the victim's] death and not the general intent to engage in conduct described by a statute defining an offense." (Citations omitted; emphasis in original.) The court further stated that, "[h]aving failed to demonstrate that the petitioner was prejudiced by . . . Graham's failure to object to the instruction, the court concludes that . . . Graham did not render ineffective assistance of counsel. Both second and first habeas counsel, therefore, were not ineffective . . . ."

The petitioner argues that the trial court's subsequent references to the correct intent standard when issuing the instruction on manslaughter "did not serve to clarify the instruction on murder." The petitioner also argues that the habeas court made its determination despite incorrectly distinguishing two cases "in part by citing to the fact that an incorrect instruction was given to each of those juries multiple times" as the court did in the petitioner's underlying criminal trial. We are unpersuaded.

"[T]he specific intent to kill is an essential element of the crime of murder . . . . To act intentionally, the defendant must have had the conscious objective to cause the death . . . .

"Intent to engage in proscribed conduct that results in death and physical injury is not sufficient. . . . As

our Supreme Court has previously stated, '[i]t is improper for the trial court to read an entire statute to a jury when the pleadings or the evidence support a violation of only a portion of the statute . . . .'

"When reviewing a challenged jury instruction . . . [the standard is] whether it is reasonably possible that the jury [was] misled. . . . In determining whether it was . . . reasonably possible that the jury was misled . . . the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect upon the jury in guiding [it] to a correct verdict in the case. . . . The charge is to be read as a whole and individual instructions are not to be judged in artificial isolation from the overall charge. . . . The test to be applied . . . is whether the charge, considered as a whole, presents the case to the jury so that no injustice will result." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *DeBarros*, 58 Conn. App. 673, 680–82, 755 A.2d 303, cert. denied, 254 Conn. 931, 761 A.2d 756 (2000).

In concluding that the petitioner failed to satisfy *Strickland*'s prejudice prong, the habeas court in part distinguished the facts of the petitioner's case from those in *State* v. *DeBarros*, supra, 58 Conn. App. 673, and *State* v. *Sivak*, 84 Conn. App. 105, 852 A.2d 812, cert. denied, 271 Conn. 916, 859 A.2d 573 (2004). In *DeBarros*, this court determined that it was "reasonably possible that the jury was misled [by improper instructions] because the probable effect of the improper charge was that it guided the jury to an incorrect verdict." *State* v. *DeBarros*, supra, 682–83. In distinguishing the improper instructions in *DeBarros* from those in *State* v. *Prioleau*, 235 Conn. 274, 322, 664 A.2d 743 (1995), and *State* v. *Austin*, 244 Conn. 226, 235, 710 A.2d 732 (1998), in which our Supreme Court determined that any instructional errors were harmless, this court

considered, in particular, the numerosity of the instructions and the order in which they were given. This court explained that "[t]he trial court [improperly] instructed on intent to 'engage in conduct' language once in *Prioleau* and twice in *Austin*. In each case, the trial court's proper instructions eliminated the risk of jury confusion over the element of intent. [In *DeBarros*], the trial court's improper instructions were too numerous to be rectified by the court's proper instructions. In total, the court either read or referred back to the improper instruction ten times." *State* v. *DeBarros*, supra, 683. This court further explained that, "in both *Prioleau* and *Austin*, the trial court read the improper instruction only as part of a general definition of intent," whereas in *DeBarros*, "the court read the instruction as a specific definition of the intent required for the crimes charged," and that "[t]he order in which the instruction [in *DeBarros*] was read likely misled the jury to believe that to intend to cause the death of another person means either to intend to cause the death of that person or to intend to engage in conduct that causes the death of that person." Id., 683–84.

Similarly, this court concluded in *Sivak* that the defendant was entitled to a new trial as a result of the trial court's having improperly included general intent language in its instructions on a specific intent crime. See *State* v. *Sivak*, supra, 84 Conn. App. 113. In rendering its decision, this court noted that "appellate review should consist of more than a numerical count of how many times the instruction was correct rather than incorrect"; id., 112; and determined that the instruction's misleading effect in that case was compounded in the numerous *additional* errors that the trial court made subsequent to the challenged charge, finding that, "[a]lthough the [trial] court in some portions of its charge correctly limited a finding of guilty . . . to require a finding of intent to cause serious physical

injury, in other portions it added to the mistake. For example, immediately after improperly charging the jury as to the inapplicable alternative definition of intent, the court distinguished intentional *conduct* from unintentional *conduct*, rather than distinguishing between intended serious physical injury and unintentional serious physical injury. Also, the court's instruction as to how to determine intent was couched in terms of *conduct*." (Emphasis in original.) Id., 109–10. In another example, defense counsel in *Sivak* had objected to the reading of the incorrect intent standard during the trial. The trial court "decided that defense counsel's objection was not apt and stated that 'in thinking over the evidence, I think [the defendant's] conduct—the full definition of intent is applicable in view of the evidence in this case.' . . . Thus, the defendant directed the court to the specific misstatement, but . . . the court persisted in not limiting its instruction . . . making the charge applicable to the definition of intent as to all three counts." Id., 108–109. As this court summarized, "the charge on intent to cause serious physical injury was key to the issue of the defendant's guilt." Id., 113.

Upon our review of the trial court's charge as a whole, and cognizant of the principles set forth in *DeBarros* and *Sivak*, we agree with the habeas court that it is not reasonably possible that the instruction on the element of intent misled the jury. The court at the petitioner's criminal trial initially read the murder statute, which included the correct specific intent language. Following the court's improper inclusion in its instruction on murder of the entire definition of intent under § 53a-3 (11), it repeatedly referenced the specific intent language when instructing the jury on manslaughter in the first degree with a firearm as a lesser included offense of murder and accessorial liability as it applied to murder and manslaughter in the first degree with a firearm. Most importantly, the court correctly distinguished for

the jury the intent elements of manslaughter and accessory to manslaughter from the specific intent language of the murder charge and accessory to murder. See, e.g., *Moody* v. *Commissioner of Correction*, 127 Conn. App. 293, 306, 14 A.3d 408 (no reversible error when court read numerous proper instructions following improper instruction and "expressly pointed out that specific intent was an element of murder but not of manslaughter in the first degree"), cert. denied, 300 Conn. 943, 17 A.3d 478 (2011). By stressing and emphasizing the differences between the elements of the offenses under which the jury could have found the petitioner guilty, the court eliminated any risk of confusion over the element of intent that could have been caused by its improper prior instruction. Moreover, on the basis of the record in its entirety, including the petitioner's incriminating statement to the police and the corroborating physical evidence the state presented at trial; see *State* v. *Sivak*, supra, 84 Conn. App. 112 ("whether a jury instruction led to an unreliable verdict is gauged not only by the language of the entire charge, but by the evidence as well"); we conclude that the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different had Graham objected to the intent instruction.

In sum, we conclude that the habeas court correctly determined that the petitioner failed to satisfy the prejudice prong under *Strickland* as to Graham's deficient performance regarding the jury instruction on intent and, therefore, that the petitioner's ineffective assistance of counsel claim against Patel in count three of the operative petition necessarily fails. Accordingly, we further conclude that the court properly rendered judgment in the respondent's favor on count three.

B

The petitioner also contends that the habeas court incorrectly concluded that he had failed to satisfy either

the performance prong or the prejudice prong under *Strickland* with respect to count four of the operative petition. We conclude that the court correctly determined that the petitioner did not satisfy *Strickland*'s prejudice prong and, accordingly, properly rendered judgment in the respondent's favor on count four.

We first set forth the standard of review and relevant legal principles governing ineffective assistance claims against appellate counsel. "The two-pronged test of *Strickland* v. *Washington*, [supra, 466 U.S. 687], applies to claims of ineffective assistance of appellate counsel. . . . *Strickland* requires that a petitioner satisfy both a performance and a prejudice prong. . . .

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . In a habeas proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities. . . .

"To establish that the petitioner was prejudiced by appellate counsel's ineffective assistance, the petitioner must show that, but for the ineffective assistance, there is a reasonable probability that, if the issue were brought before us on direct appeal, the petitioner would have prevailed." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 368–69, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

"In regard to the second prong, our Supreme Court distinguished the standards of review for claims of ineffective trial counsel and ineffective appellate counsel.

. . . For claims of ineffective appellate counsel, the second prong considers whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. . . . This requires the reviewing court to [analyze] the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm.

"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." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 119 Conn. App. 530, 535, 988 A.2d 881, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010).

In count four of the operative petition, the petitioner alleged that Patel had rendered ineffective assistance on the basis of the derivative allegation that Dalton had rendered ineffective assistance on direct appeal when she failed to raise the issue of the incorrect intent instruction. In its decision, the habeas court found that "Dalton's review of the record led to her conclusion that the trial court correctly instructed the jury on specific intent [for the murder charge], and that the correct intent instruction was repeated. . . . Dalton concluded that it was not a claim worth pursuing, although she did raise a claim challenging the dual intent instruction for accessorial liability." In addition, and as the habeas court recognized, our Supreme Court in the petitioner's direct appeal concluded that, "[u]pon examining the entire jury charge . . . the trial court properly instructed the jury regarding accessorial liability. . . . [N]othing in the challenged charge reasonably could have been interpreted as relieving the state of its burden

of proving that the [petitioner] himself intended both to aid Cheesecake and to kill the victim. Consequently, an examination of the court's instructions as a whole reveals that it is not reasonably possible that the jury was misled." *State* v. *Delgado*, supra, 247 Conn. 627. In light of the "strong presumption that . . . Dalton rendered adequate assistance," and seemingly guided by our Supreme Court in its consideration of the entire jury charge in resolving a similar claim, the habeas court determined that "Dalton's decision to not raise a claim challenging the intent instruction for murder was done within the parameters of sound professional judgment . . . ." The habeas court further determined that, even if it is assumed Dalton had rendered deficient performance, "the petitioner has failed to demonstrate that he was prejudiced because he has not shown that he would have prevailed on direct appeal had . . . Dalton raised this claim. Both second and first habeas counsel, therefore, were not ineffective for not raising [this] claim . . . ."

On appeal, the petitioner claims that the habeas court erred in rejecting the merits of count four under both prongs of *Strickland*. As the petitioner argues, "[t]he intent instruction was wrong. . . . [T]here is a reasonable chance that the jury was misled by the incorrect instruction, establishing harm. Therefore, there was a meritorious claim about the intent instruction that Dalton failed to claim, and, because it likely misled the jury, it was reasonably probable that Dalton would also have been able to establish harm on direct appeal." On the basis of our review of the merits of the underlying claimed error set forth in part II A of this opinion, however, we conclude that it is not reasonably probable that the petitioner would have prevailed on his direct appeal such that he has not demonstrated prejudice under *Strickland*. We therefore conclude that the court

properly rendered judgment in the respondent's favor on count four.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTOPHER RODRIGUEZ *v.* CITY OF HARTFORD ET AL.
(AC 45807)

Moll, Cradle and Bear, Js.

Syllabus

The plaintiff, as parent and next friend of her minor son, C, sought to recover damages from the defendants, the city of Hartford and D, the city forester, for injuries sustained by C when a tree fell on him while he was playing at a basketball court located in a city park. Eleven days before C was injured, D had visually inspected the tree at issue, which was located approximately twenty feet from the basketball court at the park. She determined that the tree did not constitute an immediate public hazard but designated the tree for removal by posting a sign on the tree allowing ten days for public comment, pursuant to a city ordinance (§ 26-11) and the statute (§ 23-59) governing the duties of tree wardens. The plaintiff's three count complaint included allegations of negligence against the city and D. The plaintiff alleged, inter alia, that the defendants were negligent in failing to adequately inspect the tree at issue and remove it. In their answer and special defenses, the defendants alleged that the plaintiff's negligence claims were barred by the doctrine of governmental immunity. Several months later, the defendants filed a motion for summary judgment, arguing that they were entitled to governmental immunity on the negligence claims because all of the allegations involved public duties that were discretionary as a matter of law. More than two years later, the plaintiff filed an objection to the motion for summary judgment wherein she argued that the defendants violated their ministerial duties as to the inspection and removal of the tree at issue. On that same day, the plaintiff also filed a request to amend her complaint, seeking to add one count asserting common-law recklessness, alleging the failure to conduct an inspection of the tree that fell on C. The plaintiff represented that her proposed new count of recklessness related back to her original complaint in that the factual basis for the claim of recklessness had not changed and the new claim merely amplified and expanded upon the allegations in the original

complaint by setting forth an alternative theory of liability. The defendants filed an objection to the request to amend, arguing that, because their motion for summary judgment had been fully briefed and there was a trial date already assigned, granting the plaintiff's request to amend to include an additional count that raised a new basis of liability would prejudice them. The trial court denied the plaintiff's request to amend, finding that the amendment would considerably delay the proceedings, that it asserted claims not raised in the complaint that was the subject of the pending summary judgment motion, and that the plaintiff had offered no explanation or rationale for the delay in asserting a new claim. Approximately one month later, the court held a hearing on the defendants' motion for summary judgment and the plaintiff's objection thereto, at which the plaintiff's counsel argued that a genuine issue of material fact existed as to whether D's duty to inspect was ministerial or discretionary. The plaintiff subsequently filed a motion for permission to file a supplemental brief to her objection to the motion for summary judgment to argue that the defendants' motion for summary judgment should be denied because the allegations of the original complaint were broad enough to state a nuisance claim and the alleged facts supported a nuisance claim not barred by governmental immunity. The defendants filed an objection arguing that the plaintiff had not, and could not, allege a public nuisance claim against them. Several weeks later, the trial date was continued to a date almost one year after the then scheduled trial date. The plaintiff filed a renewed request to amend her complaint, seeking to add one count for common-law recklessness and one count for public nuisance. In her request, the plaintiff reiterated that the new allegations related back to the allegations in the original complaint and asserted that the new trial date afforded ample time for the defendants to conduct any additional discovery that they deemed necessary. The defendants filed an objection, arguing that the trial date was continued only to provide the court with time to decide the pending motion for summary judgment and that there was no reason to revisit the trial court's prior ruling denying the plaintiff's first request to amend. The court granted the plaintiff's motion for permission to file a supplemental brief but rejected the argument therein, finding that the factual allegations of the operative complaint did not support a claim for public nuisance as an alternative to the negligence claims that had been clearly pleaded. On that same day, the court denied the plaintiff's renewed request to amend her complaint, ruling that the proposed new counts were filed beyond the applicable statutes of limitations (§§ 52-577 and 52-584) and that the new counts did not relate back to the allegations in the original complaint. The trial court subsequently issued a memorandum of decision granting the defendants' motion for summary judgment and concluding that the allegations of negligence in the plaintiff's complaint clearly related to discretionary functions and, therefore, the defendants were immune from liability both at common law and under the

statute (§ 52-557n) providing governmental immunity. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court improperly denied her first request to amend her complaint; when the plaintiff filed that request, the defendants' motion for summary judgment had been pending for more than two years, it had been briefed by both parties, and there was an upcoming trial date, and the trial court's ruling that permitting the amendment would considerably delay the proceedings in light of the upcoming trial date did not reflect an abuse of its discretion.
2. The trial court erred in denying the plaintiff's renewed request to amend her complaint on the basis that the proposed claims of recklessness and public nuisance were barred by §§ 52-577 and 52-584: neither § 52-577 nor § 52-584 establishes a remedy that does not otherwise exist, and, because such statutes of limitations are procedural, not jurisdictional, and the periods of limitation set forth therein could be waived, a trial court may not raise the limitation on its own motion; moreover, because the trial court sua sponte raised the issue of the statutes of limitations and the defendants had not objected to the plaintiff's renewed request to amend her complaint on the ground that the new allegations did not relate back to the allegations of her complaint and were, consequently, beyond the applicable statutes of limitations, the court erred in denying the request.
3. The plaintiff's claim that the trial court erred in rendering summary judgment for the defendants was unavailing:

   a. Contrary to the plaintiff's argument, the trial court did not err in concluding that her complaint failed to set forth a claim for public nuisance; although the plaintiff identified certain allegations in her complaint that she claimed set forth a claim of nuisance, specifically, that the defendants allowed C to use the basketball court in the park when they knew or should have known that the tree was rotted or dangerous and continued to maintain the tree with the same defects, those allegations, when read in the context of the entirety of the complaint, did not allege that the defendants created the condition that caused the tree to fall but, rather, that they should have recognized the hazard presented by the tree and remediated it, essentially alleging a failure to act on the part of the defendants, and a failure to act or remediate does not constitute a nuisance.

   b. The plaintiff could not prevail on her claim that the trial court erred in concluding that her claims against the defendants were barred by governmental immunity because a genuine issue of material fact existed as to whether the defendants' alleged negligence constituted a violation of a ministerial or discretionary duty: because D determined that the tree at issue in the present case did not pose an immediate public hazard, the plaintiff's claim that § 23-59 imposes a ministerial duty when a tree poses an immediate public hazard was unavailing; moreover, although the plaintiff contended that D violated her ministerial duty to properly

inspect the tree at issue, she failed to cite any authority to support her contention that D's duty to inspect the tree at issue was ministerial, and this court has previously held that § 23-59 provides that many, but not all, of the duties of a tree warden involve the exercise of discretion; furthermore, the defendants had not received a complaint or been otherwise notified that the tree at issue was potentially hazardous but, rather, the record reflected that D's inspection of the tree at issue was a matter of routine, there were no policies or regulations that set forth the manner in which the inspection of a tree must be conducted, and, in the absence of such guidelines, it was clear that the routine inspection involved D's judgment and discretion, and, therefore, the court did not err in concluding that the allegations of the complaint challenged D's discretionary conduct.

Argued November 7, 2023—officially released March 19, 2024

Procedural History

Action, inter alia, to recover damages for personal injuries sustained by the plaintiff as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Hartford, where the court, *Sheridan*, *J.*, denied the plaintiff's motions to amend the complaint; thereafter, the court, *Sheridan*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Jack G. Steigelfest, with whom, on the brief, was *Thomas P. Cella*, for the appellant (plaintiff).

Thomas R. Gerarde, for the appellees (defendants).

Opinion

CRADLE, J. The plaintiff, Carmen Rodriguez, as parent and next friend of her minor son, Christopher Rodriguez (Christopher),[1] appeals from the summary judgment rendered in favor of the defendants, the city of

[1] Although Christopher, a minor, was named as the plaintiff in this case, the action was brought by Carmen Rodriguez on behalf of Christopher as Christopher's parent, as the general rule in Connecticut is that "minor children may . . . sue [only] by way of a parent or next friend." *Mendillo* v. *Board of Education*, 246 Conn. 456, 460 n.3, 717 A.2d 1177 (1988), overruled in part on other grounds by *Campos* v. *Coleman*, 319 Conn. 36, 123 A.3d 854 (2015). In the interest of simplicity, we refer to Carmen Rodriguez as the plaintiff throughout this opinion.

Hartford (city) and Heather Dionne, the city forester, in this action to recover damages for injuries sustained by Christopher when a tree fell on him while he was playing at a basketball court located in a city park. On appeal, the plaintiff claims that the court erred by (1) denying her requests to amend her complaint and (2) concluding that her complaint did not set forth a claim of public nuisance and that no genuine issue of material fact existed as to whether her claims against the defendants were barred by governmental immunity. We conclude that the court properly rendered summary judgment as to the plaintiff's negligence claims but that the court erred in denying one of the plaintiff's requests to amend her complaint. We therefore affirm in part and reverse in part the judgment of the trial court.

The following undisputed facts, as set forth by the trial court, and procedural history are relevant to our resolution of this appeal. "[Dionne] is the city forester for the city of Hartford, a position she has held since 2012. The city forester is charged with the responsibility of carrying out the laws of the state and the ordinances of the city of Hartford with respect to all trees, shrubs or vines in highways, public parks and public grounds within the city. On July 27, 2018, Dionne visually inspected the subject tree at issue in this case. The tree was located approximately twenty feet from a public basketball court at Goodwin Park. Dionne looked at the trunk of the tree, the attachment of the branches to the tree, and the ground around the tree. Dionne observed 'tip dieback' (dying of the tips of branches), thinning of the crown of the tree, small leaf size, and poor root integrity.

"Dionne determined that the tree did not 'constitute an immediate public hazard' and designated the tree for removal by posting a sign on the tree allowing ten days for public comment, pursuant to chapter 26, article

I, § 26-11 of the Hartford Code of Ordinances[2] and General Statutes § 23-59.[3]

[2] "Chapter 26, article I, § 26-11, of the Hartford Code of Ordinances provides in relevant part: '(c) Whenever, in the opinion of the Director of Parks and Recreation or the City Forester appointed under the provisions of section 26-13, the public safety demands the removal or pruning of any tree or shrub under the control of the Department of Parks and Recreation, he may cause such tree or shrub to be removed or pruned. Unless such tree or shrub constitutes an immediate public hazard, he shall, at least five (5) days before such removal, post thereon a suitable notice stating his intention to remove such tree or shrub. If any person objects to such removal, he may appeal to the Director of Parks and Recreation in writing, who shall hold a public hearing at some suitable time and place after giving reasonable notice of such hearing to all persons known to be interested therein and posting a notice thereof on such tree or shrub. Within three (3) days after such hearing, the Director of Parks and Recreation shall render his decision granting or denying the application.' "

[3] "General Statutes § 23-59 provides: 'Powers and duties of tree wardens. The town or borough tree warden shall have the care and control of all trees and shrubs in whole or in part within the limits of any public road or grounds and within the limits of his town or borough, except those along state highways under the control of the Commissioner of Transportation and except those in public parks or grounds which are under the jurisdiction of park commissioners, and of these the tree warden shall take the care and control if so requested in writing by the park commissioners. Such care and control shall extend to such limbs, roots or parts of trees and shrubs as extend or overhang the limits of any such public road or grounds. The tree warden shall expend all funds appropriated for the setting out, care and maintenance of such trees and shrubs. The tree warden shall enforce all provisions of law for the preservation of such trees and shrubs and of roadside beauty. The tree warden shall remove or cause to be removed all illegally erected signs or advertisements, placed upon poles, trees or other objects within any public road or place under the tree warden's jurisdiction. The tree warden may prescribe such regulations for the care and preservation of such trees and shrubs as the tree warden deems expedient and may provide therein for a reasonable fine for the violation of such regulations; and such regulations, when approved by the selectmen or borough warden and posted on a public signpost in the town or borough, if any, or at some other exterior place near the office of the town or borough clerk, shall have the force and effect of town or borough ordinances. Whenever, in the opinion of the tree warden, the public safety demands the removal or pruning of any tree or shrub under the tree warden's control, the tree warden may cause such tree, shrub or group of shrubs to be removed or pruned at the expense of the town or borough and the selectmen or borough warden shall order paid to the person performing such work such reasonable compensation therefor as may be determined and approved in writing by the tree warden. Unless the condition of such tree, shrub or group of shrubs constitutes an immediate public hazard, the tree warden shall, at least ten days

"Eleven days later, on August 7, 2018, at approximately 6:45 p.m., [Christopher], a ten year old boy, was playing basketball on the basketball court when the tree fell onto the basketball court, crushing his legs and causing other serious injuries." (Footnotes in original.)

The plaintiff thereafter commenced this action on February 11, 2019, and her complaint consisted of three counts. Count one alleged negligence against the city, count two alleged negligence against Dionne, and count three alleged that the city was obligated to indemnify Dionne for any damages caused by her negligence. The plaintiff alleged, inter alia, that the defendants were negligent in failing to adequately inspect the tree at issue and remove it. The defendants filed an answer and special defenses to the plaintiff's complaint. In their answer, the defendants denied the plaintiff's allegations or left her to her proof. By way of special defense, the defendants alleged that Christopher was contributorily negligent in that he "failed to act as a reasonably prudent person under the circumstances . . . [by] remain[ing] outdoors in a public park during a storm involving rain and high winds." The defendants also alleged that the plaintiff's claims were barred by the doctrine of governmental immunity.

before such removal or pruning, post on each tree or shrub and may post on each group of shrubs a suitable notice stating the tree warden's intention to remove or prune such tree, shrub or group of shrubs. If any person, firm or corporation objects to such removal or pruning, such person, firm or corporation may appeal to the tree warden in writing, who shall hold a public hearing at some suitable time and place after giving reasonable notice of such hearing to all persons known to be interested therein and posting a notice thereof on such tree, shrub or group of shrubs. Within three days after such hearing, the tree warden shall render a decision granting or denying the application, and the party aggrieved by such decision may, within ten days, appeal therefrom to the superior court for the judicial district within which such town or borough is located. The tree warden may, with the approval of the selectmen or borough warden, remove any trees or other plants within the limits of public highways or grounds under the tree warden's jurisdiction that are particularly obnoxious as hosts of insect or fungus pests.' "

On December 26, 2019, the defendants filed a motion for summary judgment arguing that they were entitled to governmental immunity on the negligence claims because all of the allegations involved public duties that are discretionary as a matter of law. The defendants further argued that, as to count three, because there was no legally viable negligence claim as to Dionne, the plaintiff's indemnification claim against the city failed as a matter of law. The plaintiff filed several motions for extension of time to file an opposition to the defendants' motion for summary judgment to allow her to complete discovery. The defendants consented to the plaintiff's motions.

On March 11, 2022, the plaintiff filed an objection to the motion for summary judgment wherein she argued that the defendants violated their ministerial duties as to the inspection and removal of the tree at issue.

On that same day, the plaintiff also filed a request to amend her complaint, seeking to add a count asserting common-law recklessness, alleging the failure to conduct an inspection of the tree that fell on Christopher. The plaintiff represented that her proposed new count of recklessness related back to her original complaint in that "[t]he factual basis for the claim of recklessness has not changed and the new claims merely amplify and expand upon the previous allegations in the original complaint by setting forth an alternate theory of liability." The defendants filed an objection to the request to amend, arguing that, because their motion for summary judgment had been fully briefed and there was a trial date assigned for August 3, 2022, granting the plaintiff's request to amend to include an additional count that raised a new basis of liability would prejudice them. The defendants also argued that the plaintiff offered no explanation in her request to amend as to why she waited more than two years after their filing of the motion for summary judgment to seek to amend her

complaint. The plaintiff filed a reply to the defendants' objection wherein she argued that her proposed amendment was based upon recently conducted discovery by the parties.

On April 11, 2022, the trial court, *Sheridan*, *J.*, denied the plaintiff's request to amend "because this case is scheduled for jury selection and the amendment will considerably delay the proceedings, the proposed amendment asserts claims not raised in the complaint which is the subject of a pending summary judgment motion, and because no explanation or rationale for the [delay] in asserting this claim has been provided." The plaintiff thereafter filed a motion for reargument or reconsideration of the court's denial of her request to amend, which the court summarily denied.

On April 18, 2022, the court held a hearing on the defendants' motion for summary judgment and the plaintiff's objection thereto, at which counsel for all parties appeared and presented argument in support of their respective positions. At the hearing, the plaintiff's counsel argued, consistent with the plaintiff's written objection to the defendants' motion, that a genuine issue of material fact existed as to whether Dionne's duty to inspect was ministerial or discretionary. At the conclusion of the hearing, the court took the matter under advisement.

On May 6, 2022, the plaintiff filed a motion for permission to file a supplemental brief to her objection to the motion for summary judgment to argue that the defendants' motion for summary judgment should be denied because the allegations of the original complaint were broad enough to state a nuisance claim and the alleged facts supported a nuisance claim not barred by governmental immunity. The defendants filed an objection arguing that the plaintiff has not, and cannot, allege a public nuisance claim against them.

On June 6, 2022, the court issued an order scheduling a videoconference for June 22, 2022, for the present case, in addition to all cases "set down for jury and court trial in July/August 2022," at which time counsel was "expected to either (1) report the case ready for jury selection and give an estimate of the days of evidence expected; or (2) request a continuance to a new trial date and agree upon the new trial date." As a result of the conference in the present case, the trial date was continued from August 3, 2022, to June 22, 2023.

On June 23, 2022, the plaintiff filed a "renewed" request to amend the complaint seeking to add a count for common-law recklessness and a count for public nuisance. In her request, the plaintiff reiterated that the new allegations related back to the allegations in the original complaint and asserted that the new trial date afforded ample time for the defendants to conduct any additional discovery that they deemed necessary. The defendants filed an objection arguing that the trial date was continued only to provide the court with time to decide the pending motion for summary judgment and that there was no reason to revisit the trial court's April 11, 2022 ruling denying the plaintiff's March, 2022 request to amend.

On August 22, 2022, the court granted the plaintiff's motion for permission to file a supplemental brief; however, the court ruled that "the argument advanced in the supplemental brief is rejected. The factual allegations of the operative complaint do not support a claim for public nuisance as an alternative to the negligence claims which have been clearly [pleaded]. Any argument based on concepts of public nuisance is therefore immaterial."

On that same day, the court denied the plaintiff's renewed request to amend her complaint, ruling that the proposed new counts were filed beyond the applicable

statutes of limitations and that the new counts do not relate back to the allegations of the original complaint.

On August 30, 2022, the trial court issued a memorandum of decision rendering summary judgment in favor of the defendants. The trial court concluded that the allegations of negligence in counts one and two clearly related to discretionary functions and, therefore, the defendants were immune from liability both at common law and under General Statutes § 52-557n. The court further determined that, in the absence of liability for Dionne, there was no basis for a statutory indemnification claim against the city. This appeal followed.

I

The plaintiff first claims that the court erred by denying both of her requests to amend her complaint. We address each of the court's rulings in turn.

A

As noted herein, the plaintiff filed her first request to amend her complaint to add allegations of recklessness against the defendants on March 11, 2022, which was the same day that she filed her objection to the defendants' motion for summary judgment, which was filed on December 26, 2019, more than two years earlier. The court denied the plaintiff's request on the grounds that allowing the amendment would delay the proceedings, the defendants' motion for summary judgment was pending, and the plaintiff had offered no explanation for the delay in seeking to amend her complaint. When the plaintiff thereafter sought reconsideration of her request to amend, she referred to her reply to the defendants' objection to her request, wherein she explained that the delay was due to the fact that she had only recently been able to complete the deposition of Dionne and consult with experts. The court summarily denied her motion for reconsideration.

"Our standard of review of the [plaintiff's] claim is well defined. A trial court's ruling on a motion of a party to amend its complaint will be disturbed only on the showing of a clear abuse of discretion. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [plaintiff's] burden in this case to demonstrate that the trial court clearly abused its discretion. . . .

"A trial court may allow, in its discretion, an amendment to pleadings before, during, or after trial to conform to the proof. . . . Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Booth* v. *Park Terrace II Mutual Housing Ltd. Partnership*, 217 Conn. App. 398, 432, 289 A.3d 252 (2023).

Here, the plaintiff has failed to demonstrate that the court abused its discretion in denying her first request to amend her complaint. When the plaintiff filed that request, the defendants' motion for summary judgment had been pending for more than two years and had been briefed by both parties, and there was an upcoming trial date. The trial court found that permitting the amendment would considerably delay the proceedings in light of the upcoming trial date. On those bases, we conclude that the court's ruling did not reflect an abuse of its discretion.

B

The plaintiff next claims that the court erred in denying her "renewed" request to amend her complaint.

Specifically, the plaintiff argues that the court erred in addressing sua sponte whether the proposed claims of recklessness and public nuisance were barred by the applicable statutes of limitations. We agree.

As noted herein, after the trial date in this case was continued, the plaintiff filed a "renewed" request to amend her complaint, to which the defendants objected, arguing only that there was no reason for the court to revisit its earlier denial of the plaintiff's request to amend and that the plaintiff was simply attempting to "elude . . . summary judgment." The defendants did not argue in their objection to the plaintiff's request to amend that the new allegations were beyond the statutes of limitations or that they did not relate back to the allegations of the plaintiff's initial complaint.

The court nevertheless denied the plaintiff's renewed request to amend her complaint on the ground that the new allegations did not relate back to those in the initial complaint. The court held: "The proposed new counts are filed well beyond the two year limitation period in [General Statutes] § 52-584 for a claim of common-law recklessness and outside the three year limitation period provided by [General Statutes] § 52-577 for actions alleging a public nuisance.

"[I]t is well settled that an amended complaint relates back to and is treated as filed at the time of the original complaint unless it alleges a new cause of action . . . . Thus, an amendment cannot allege a new cause of action that would be barred by the statute of limitations if filed independently. . . . Comparing the allegations in the original complaint to those in the proposed amended complaint, no allegations were set forth concerning public nuisance or common-law recklessness. To prove the challenged allegations of the amended complaint would require the presentation of new and different evidence as to different issues. . . . The

plaintiff's new theories of liability are not supported by the original factual allegations of the earlier, timely complaint, and would require the presentation of new and different evidence, the amendment does not relate back. . . . As the new counts require proof of different elements and different evidence, the new counts do not relate back to the original allegations of negligence in the complaint." (Citations omitted; internal quotation marks omitted.)

The plaintiff argues that the court erred in raising sua sponte the statutes of limitations governing her proposed new claims. Our Supreme Court has stated that "[t]he de novo standard of review is always the applicable standard of review for" making such a determination. (Internal quotation marks omitted.) *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, 325 Conn. 198, 206, 157 A.3d 70 (2017). Indeed, "[i]f the statute of limitations has expired and an amended pleading does not relate back to the earlier pleading, then the trial court has no discretion to allow an amendment." Id., 206 n.8.

It is well settled, however, that statutes of limitations may be waived and are, typically, not properly raised by the court sua sponte. "Where the trial court wishes to raise a statute of limitations issue which has not been raised by the parties, the question becomes whether the limitation is considered procedural or jurisdictional. . . . The general rule is that where the right of action exists independently of the statute in which the limitation is found, such a statutory bar is considered personal and procedural, and it is deemed waived unless it is specially pleaded. . . . This is so because it is considered that the limitation acts as a bar to a remedy otherwise available. . . . In these instances, a trial court may not raise the limitation on its own motion. Where, however, a specific limitation is contained in the statute which establishes the remedy, the remedy

exists only during the prescribed period and not thereafter. In this situation, the court may properly raise the statute of limitations issue on its own motion because it is considered substantive or jurisdictional, and not subject to waiver." (Citations omitted.) *Orticelli* v. *Powers*, 197 Conn. 9, 15, 495 A.2d 1023 (1985).

Here, the court applied the statutes of limitations set forth in §§ 52-577 and 52-584,[4] neither of which establishes a remedy that does not otherwise exist. Therefore, those statutes are procedural, not jurisdictional, and the limitation periods set forth therein may be waived. See id.; *Cue Associates, LLC* v. *Cast Iron Associates, LLC*, 111 Conn. App. 107, 116–17, 958 A.2d 772 (2008). Because the defendants did not object to the plaintiff's renewed request to amend her complaint on the ground that the new allegations did not relate back to the allegations of her complaint and were, consequently, beyond the applicable statutes of limitations, the court erred in denying the request on that basis.[5]

II

The plaintiff also claims that the court erred in rendering summary judgment in favor of the defendants on

[4] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

General Statutes § 52-584 provides: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, advanced practice registered nurse, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed."

[5] On remand, the court will have to consider whether to grant the renewed request to amend in light of the arguments made by the parties at the time the amendment was sought, as well as the current circumstances, and any additional arguments that the parties might make, including any argument made by the defendants that the proposed causes of action do not relate

the claims set forth in her complaint. Specifically, the plaintiff argues that the court erred in concluding that her complaint failed to set forth a claim of public nuisance and that her negligence claims against the defendants were barred by governmental immunity. We are not persuaded.

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Schofield* v. *Rafley, Inc.*, 222 Conn. App. 448, 460, 305 A.3d 652 (2023). With these principles in mind, we address in turn the plaintiff's challenges to the court's summary judgment.

A

The plaintiff first argues that the court erred in rejecting her contention that her complaint set forth a claim for public nuisance. As recounted previously, the

back to the original complaint and are barred by the applicable statutes of limitations.

plaintiff initially did not object to the defendants' motion for summary judgment on this basis but sought permission, following oral argument on the defendants' motion and her initial objection, to file a supplemental brief to raise this argument as an additional basis upon which to defeat the defendants' claim of governmental immunity. The court allowed the plaintiff to file a supplemental brief but held that the allegations of the complaint did not set forth a claim of public nuisance. The plaintiff argues that the court erred in so concluding.

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Emphasis omitted; internal quotation marks omitted.) *Carpenter* v. *Daar*, 346 Conn. 80, 128, 287 A.3d 1027 (2023).

We next set forth the principles applicable to a nuisance claim brought against a municipality. Our Supreme Court "has stated often that a plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury [on] person or property; (2) the danger created was a continuing

one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages. . . . In addition, when the alleged tortfeasor is a municipality, our common law requires that the plaintiff also prove that the defendants, by some positive act, created the condition constituting the nuisance. . . . This common-law rule is codified at § 52-557n (a) (1) (C), which provides in relevant part that a political subdivision of the state shall be liable for damages to person or property caused by . . . acts of the political subdivision which constitute the creation or participation in the creation of a nuisance . . . .

"Our Supreme Court has described the positive act requirement as follows: [A]t a bare minimum, § 52-557n (a) (1) (C) requires a causal link between the acts and the alleged nuisance. A failure to act to abate a nuisance does not fall within the meaning of the term acts, as used in § 52-557n (a) (1) (C), because inaction does not create or cause a nuisance; it merely fails to remediate one that had been created by some other force. Accordingly, the plain meaning of § 52-557n (a) (1) (C) leads us to conclude that provision imposes liability in nuisance on a municipality only when the municipality positively acts (does something) to create (cause) the alleged nuisance. . . .

"A positive act is conduct that intentionally created the conditions alleged to constitute a nuisance. . . . [F]ailure to remedy a dangerous condition not of the municipality's own making is not the equivalent of the required positive act. . . . Similarly, permissive continuation of the alleged nuisance is not a positive act." (Citations omitted; internal quotation marks omitted.) *Bennetta* v. *Derby*, 212 Conn. App. 617, 622–23, 276 A.3d 455, cert. denied, 344 Conn. 903, 277 A.3d 135 (2022).

In her original complaint, the plaintiff set forth numerous ways in which she alleged that the defendants

were negligent. In support of her contention that her original complaint set forth a claim of nuisance, the plaintiff identifies those allegations that she claims set forth a claim of nuisance: that the defendants "allowed [Christopher] and other visitors to use the basketball court in Goodwin Park when they knew or should have known that the tree next to the basketball court was rotted and dangerous" and "[t]hey created and maintained a dangerous and hazardous condition in Goodwin Park, or should have known that said tree was defective and hazardous, yet they continued to maintain it in the same manner with the same defects." In so claiming, the plaintiff essentially is alleging a failure to act on the part of the defendants, which, as we have stated, does not constitute a nuisance. When read in the context of the entirety of the complaint, the plaintiff has not alleged that the defendants created the condition that caused the tree to fall but that they should have recognized the hazard presented by the tree and remediated it. Because, as stated previously, a failure to act or remediate does not constitute a nuisance, the court did not err in concluding that the plaintiff's complaint failed to set forth such a claim.

B

The plaintiff also claims that the court erred in concluding that her claims against the defendants were barred by governmental immunity because a genuine issue of material fact exists as to whether the defendants' alleged negligence constituted a violation of a ministerial or discretionary duty.

The following legal principles guide our analysis of the plaintiff's claim. "According to our Supreme Court, [a] municipality itself was generally immune from liability for its tortious acts at common law . . . . [The court has] also recognized, however, that governmental immunity may be abrogated by statute. . . . [Section]

52-557n (a) (1) provides in relevant part: Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . [Our Supreme Court] previously [has] concluded that [t]his language clearly and expressly abrogates the traditional common-law doctrine in this state that municipalities are immune from suit for torts committed by their employees and agents. . . .

"Subdivision (2) of § 52-557n (a) lists two exceptions to the statutory abrogation of governmental immunity. The exception relevant to this appeal provides: Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . . The statute, thus, distinguishes between discretionary acts and those that are ministerial in nature, with liability generally attaching to a municipality only for negligently performed ministerial acts, not for negligently performed discretionary acts. . . .

"The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . . In order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling a municipal employee] to [act] in any prescribed manner. . . .

"In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered

discretionary acts entitled to governmental immunity. . . . A municipality necessarily makes discretionary policy decisions with respect to the timing, frequency, method and extent of inspections, maintenance and repairs. . . . Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder . . . there are cases where it is apparent from the complaint. . . . [W]hether an act or omission is discretionary in nature and, thus, whether governmental immunity may be successfully invoked pursuant to § 52–557n (a) (2) (B), turns on the character of the act or omission complained of in the complaint. . . . Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions *necessarily* involved the exercise of judgment, and thus, necessarily were discretionary in nature, summary judgment is proper." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 223–25, 131 A.3d 771 (2016).

Here, in addition to the undisputed facts set forth previously in this decision, the court also found, and it is undisputed, that "[a]s of July 27, 2018, there was no state of Connecticut or city of Hartford statute, ordinance, regulation, directive or policy which mandated the frequency or manner in which trees were to be examined, inspected, or designated to be culled, trimmed, or cut down within the city of Hartford.

"Prior to July 27, 2018, neither Dionne nor the city of Hartford had received a complaint about the tree that fell on August 7, 2018, at Goodwin Park or were otherwise notified that the tree presented a hazardous condition."

In concluding that the duty at issue was discretionary and not ministerial, the court reasoned that "[t]here is

no statute or ordinance that prescribes the specific manner in which a tree warden must inspect a tree and what conditions would render a tree an immediate public hazard. Of necessity, much is left to the tree warden in the exercise of his or her own personal discretion to make those judgments. In a similar manner, no statute or ordinance—including . . . § 23-59—mandates that tree removal take place immediately upon the expiration of the ten day public comment period. The plaintiff has failed to identify a statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a tree warden or city forester to act in a prescribed manner, without the exercise of judgment or discretion. Thus, the [plaintiff has] failed to establish the existence of a ministerial duty that has been violated."

On appeal, the plaintiff's challenge to the summary judgment is twofold. First, she argues that "§ 23-59 imposes a ministerial duty when a tree poses an immediate public hazard." Because Dionne determined that the tree here did not pose an immediate public hazard, this argument merits no further discussion.

The plaintiff also contends that Dionne violated her ministerial duty to properly inspect the tree at issue. In support of this contention, the plaintiff argues that Dionne's visual inspection of the tree " 'amounted to no inspection at all.' " The plaintiff, however, has not cited any authority to support her contention that Dionne's duty to inspect the tree at issue was ministerial. Indeed, this court has held that § 23-59 "provides that many, but not all, of the duties of a tree warden involve the exercise of discretion." *Wisniewski* v. *Darien*, 135 Conn. App. 364, 373, 42 A.3d 436 (2012). *Wisniewski* involved a tree warden's ministerial duty to inspect upon receipt of a complaint concerning a potentially hazardous tree, which was supported by the testimony of the tree warden himself. Id., 374–75. The court in *Wisniewski* did

not, however, address the manner or methods in which the tree should be inspected or what such an inspection should entail.

Here, there was no complaint asserting that the tree at issue was potentially hazardous. Rather, the record reflects that Dionne's inspection of the tree at issue was a matter of routine. There were no policies or regulations that set forth the manner in which the inspection of a tree must be conducted. In the absence of such guidelines, it is clear that the routine inspection involved Dionne's judgment and discretion. We therefore conclude that the court did not err in concluding that the allegations of the complaint challenged Dionne's discretionary conduct. Accordingly, the court properly granted the defendants' motion for summary judgment.

The judgment is reversed with respect to the denial of the plaintiff's renewed request to amend her complaint and the case is remanded for further proceedings on the renewed request to amend the complaint; the judgment is affirmed with respect to the granting of summary judgment on the three counts of the original complaint and the denial of the plaintiff's first request to amend her complaint.

In this opinion the other judges concurred.

QUINCY RAPP *v.* COMMISSIONER OF CORRECTION (AC 46079)

Alvord, Cradle and Clark, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of murder, sought a writ of habeas corpus, claiming that both his trial counsel and prior habeas counsel were ineffective and that his guilty plea was not knowing, intelligent and voluntary in violation of his due process rights. In 2010, approximately two years after his conviction, the petitioner filed a petition for habeas corpus, in which he was represented by D.

In 2013, the petitioner withdrew his petition just prior to trial. In 2018, the petitioner filed the underlying habeas petition, which he amended in 2022. The respondent, the Commissioner of Correction, filed a motion pursuant to the statute (§ 52-470) governing summary disposal of habeas corpus matters for an order to show cause as to why the petition should not be dismissed as untimely because it was filed more than five years after the petitioner's judgment of conviction became final in 2008. In response, the petitioner claimed that good cause existed for the delay in the filing of his petition because D failed to advise him of the time constraints outlined in § 52-470 for a subsequent habeas petition and, if he had been so advised, he would not have withdrawn his first habeas petition. The habeas court found that the petitioner had failed to show good cause for the delay in filing and dismissed the petition. Just prior to oral argument in the present appeal, the Supreme Court issued its decision in *Rose* v. *Commissioner of Correction* (348 Conn. 333), which held that ineffective assistance of counsel is an objective factor external to a petitioner that may constitute good cause to excuse the late filing of a habeas petition under the totality of the circumstances pursuant to § 52-470 (c) and (e). *Held* that the habeas court did not apply the correct legal standard under § 52-470 (c) and (e) in deciding that the petitioner had not demonstrated good cause for the late filing of his habeas petition; although the habeas court did not expressly reject the petitioner's allegation that D's alleged ineffective assistance in not advising him of the deadline for filing a new petition caused the delay, the habeas court did not consider the alleged ineffective assistance of counsel as an external factor that caused the delay in filing the untimely petition, and, in light of the Supreme Court's decision in *Rose*, the petitioner was entitled to a new hearing at which the court applies the correct legal standard set forth by the Supreme Court.

Argued January 10—officially released March 19, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

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

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's

attorney, and *Elizabeth Mosely*, senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Quincy Rapp, appeals from the habeas court's dismissal of his amended petition for a writ of habeas corpus as untimely under General Statutes § 52-470 (c) and (e).[1] On appeal, the petitioner claims that the court erred in concluding that he failed to establish good cause for his untimely petition. Specifically, the petitioner argues that his prior habeas counsel's failure to advise him of the statutory deadline for filing a new petition following the withdrawal of his then pending petition constituted ineffective assistance of counsel, which constituted good cause for the delay in filing.[2] In light of our Supreme Court's

[1] General Statutes § 52-470 provides in relevant part: "(c) Except as provided in subsection (d) of this section, there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. . . .

"(e) . . . If . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ."

[2] The petitioner also argues that good cause existed for his delay in filing because he did not believe that he had a valid basis for his petition until the 2018 release of *Cruz* v. *United States*, Docket No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. March 29, 2018) (holding that decision in *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), applies to persons who were eighteen years old at time of their crimes, making sentencing schemes requiring mandatory life sentences without possibility of parole violation of eighth amendment prohibition against cruel and unusual punishment by failing to consider youth and accompanying considerations in sentencing), vacated, 826 Fed. Appx. 49 (2d Cir. 2020). Although the habeas court referred to this argument as support for its conclusion that

recent decision in *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 304 A.3d 431 (2023), we conclude that the judgment of the habeas court must be reversed, and we remand the case for a new good cause hearing.[3]

The following procedural history is relevant to our resolution of the petitioner's claim on appeal. In 2008, pursuant to a guilty plea, the petitioner was convicted of murder in violation of General Statutes § 53a-54a, for which he was sentenced to a term of fifty years of incarceration. The petitioner did not appeal his conviction. In 2010, the petitioner filed a petition for a writ of habeas corpus, in which he was represented by Attorney John Duguay.[4] On June 6, 2013, just prior to trial, the petitioner withdrew his petition.[5]

the petitioner had ample opportunity to learn of the filing deadlines set forth in § 52-470, it did not address the petitioner's argument that good cause existed for his delay because he did not believe that he had a basis for his petition until the release of *Cruz* in 2018. Because the court did not address this argument, it is not properly before us now.

[3] In light of this resolution, we need not address the petitioner's additional claim that the court abused its discretion in denying his motion for continuance of the good cause hearing to afford him the opportunity to subpoena his prior habeas counsel, who then resided in Colorado, or to obtain an affidavit from him regarding what advice he rendered to the petitioner, if any, regarding the § 52-470 deadlines. We note, however, that the habeas court's denial of the petitioner's motion for continuance, like its ultimate decision on good cause, was not fully informed in that *Rose* had not yet been decided when the court ruled on that motion and, in the absence of that ruling, the alleged ineffective assistance of the petitioner's prior habeas counsel was not an external factor for the court's consideration when determining good cause. In other words, prior to *Rose*, a continuance to secure the testimony of prior habeas counsel would have been unnecessary. On remand, the petitioner should be afforded a reasonable opportunity, within the court's discretion, to subpoena or otherwise attempt to secure admissible evidence pertaining to the assistance rendered by the petitioner's prior habeas counsel.

[4] At that time, Duguay was an associate attorney at the Law Office of Michael D. Day, LLC. After Michael Day met with the petitioner once upon the appointment of his office to represent the petitioner, Duguay undertook the representation of the petitioner.

[5] At the good cause hearing in this action, the petitioner testified that, in connection with his first habeas petition, he underwent a psychological evaluation but that that evaluation "didn't show whatever it was supposed

On October 31, 2018, the petitioner filed the underlying habeas petition, which he amended on March 21, 2022. In his amended petition, the petitioner raised three claims. The petitioner alleged that both his trial counsel and prior habeas counsel had rendered ineffective assistance and that his guilty plea was not knowing, intelligent and voluntary in violation of his due process rights. On May 25, 2022, the respondent, the Commissioner of Correction, filed a motion pursuant to § 52-470 (c) and (e) for an order to show cause as to why the petition should not be dismissed as untimely because it was filed more than five years after his judgment of conviction became final on November 27, 2008, when the period for filing an appeal of that judgment expired. In response, the petitioner claimed that "good cause" existed for the delay in the filing of his petition because his prior habeas counsel, Duguay, failed to advise him of the time constraints outlined in § 52-470 for a subsequent habeas petition and, if he had been so advised, he would not have withdrawn his first habeas petition.[6]

On September 23, 2022, the court held a good cause hearing, at which the petitioner testified, inter alia, that he was unaware of the filing deadlines set forth in § 52-470 because Duguay never informed him of those deadlines.[7]

to show . . . ." The petitioner testified that, on that basis, Duguay "suggested that [the petitioner] withdraw [his] habeas because the case was weak, and if [he] didn't withdraw the habeas, that [Duguay] would file an *Anders* brief . . . ."

[6] The petitioner also claimed that the delay in his filing was caused by "the Department of Correction's denial of [his] constitutional right of access to the courts by failing to provide adequate legal resources that would allow him to educate himself about the time limitations for filing a habeas corpus petition." To the extent the habeas court implicitly rejected that claim, the petitioner has not challenged that ruling on appeal.

[7] At the good cause hearing, the petitioner, through his counsel, attempted to introduce into evidence emails between Duguay and the petitioner's counsel pertaining to what Duguay told the petitioner as to the § 52-470 filing deadlines. The court declined to admit them into evidence because there was no foundation for them, they constituted hearsay and they were

On October 13, 2022, the court, by way of a memorandum of decision, rejected the petitioner's argument that good cause existed for the delay in the filing of his petition and dismissed it. The court reasoned: "[T]he petitioner has failed to show good cause for the delay in filing his petition. He admits that he was actively researching rather complicated legal issues related to his alleged mental health in order to challenge his conviction but claims that he was otherwise unaware of the fact that there was a time limitation on filing a challenge to his conviction. [T]he time worn maxim [is] that everyone is presumed to know the law, and that ignorance of the law excuses no one . . . . *Provident Bank* v. *Lewitt*, 84 Conn. App. 204, 209, 852 A.2d 852, cert. denied, 271 Conn. 924, 859 A.2d 580 (2004). Those tenets are founded upon public policy and in necessity, and the idea [behind] them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral inquiries into the content of men's minds. . . . Id., 209–10. Thus, the [petitioner] is charged with knowledge of the law. *State* v. *Surette*, 90 Conn. App. 177, 182, 876 A.2d 582 (2005). Even given the benefit entitled to an incarcerated inmate due to the lack of complete autonomy and access to the legal library, there was no evidence here that anything *prohibited or interfered* with the petitioner's ability to find out about § 52-470, as opposed to the fact that he chose to focus on researching other legal issues. And, while the petitioner insinuates that the age of the legal material he had access to prohibited him from timely access to changes in the law, he filed the current petition within eight months of the release of *Cruz* [v. *United States*, Docket No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. March 29, 2018), vacated,

being offered to "prove a fact that right now before [the court] [based on the petitioner's testimony] is uncontroverted."

826 Fed. Appx. 49 (2d Cir. 2020)], which was an unreported decision. Surely, therefore, then the petitioner had ample opportunity to educate himself or to otherwise become aware of the changes in § 52-470 that became effective in October, 2012. Public Acts 2012, No. 12-115, § 1. The delay here was not outside forces beyond the petitioner's control; it was simply that the petitioner had not found what he believed the proper legal issue to attach his claims to." (Emphasis in original; internal quotation marks omitted.) Thereafter, the habeas court granted the petitioner's petition for certification to appeal, and this appeal followed.

After the parties filed their briefs in this appeal, but before oral argument, our Supreme Court issued its decision in *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333. At oral argument, the parties were prepared to address, and did address, the impact of *Rose* on their respective positions. The issue in this case, whether the habeas court properly rejected the petitioner's claim that ineffective assistance of his prior habeas counsel constituted good cause for the delay in the filing of his petition, specifically in light of *Rose*, is the same issue that was before this court in *Hankerson* v. *Commissioner of Correction*, 223 Conn. App. 562, 567–71, A.3d (2024). In *Hankerson*, this court explained: "In *Rose*, the court addressed whether prior habeas counsel's failure to advise a petitioner of the deadline for filing a new petition following the withdrawal of a pending petition may constitute good cause to justify a late-filed petition under § 52-470 (c) . . . and (e). See [*Rose* v. *Commissioner of Correction*, supra], 346–47. In that case, the respondent, relying on our Supreme Court's decision in *Kelsey* v. *Commissioner of Correction*, [343 Conn. 424, 441–42, 274 A.3d 85 (2022)], argued that an error by counsel, even if it rose to the level of constitutionally deficient performance, was not an external factor that could constitute good cause.

Rose v. *Commissioner of Correction*, supra, 347. In particular, the respondent in *Rose* relied on the Supreme Court's statement in *Kelsey* that, to rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something *outside of the control of the petitioner or habeas counsel* caused or contributed to the delay. . . . *Kelsey* v. *Commissioner of Correction*, supra, 441–42.

"In *Rose*, the court rejected the respondent's reliance on *Kelsey* and, instead, relying on federal precedents in the area of procedural default . . . concluded that [i]neffective assistance of counsel is an objective factor external to the defense because the [s]ixth [a]mendment itself requires that responsibility for the default be imputed to the [s]tate. . . . In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of [the] petitioner's right to counsel, so that the error must be seen as an external factor, i.e., imputed to the [s]tate. . . . Although a petitioner is bound by his counsel's inadvertence, ignorance, or tactical missteps, regardless of whether counsel is flouting procedural rules or hedging against strategic risks, a petitioner is not bound by the ineffective assistance of his counsel. . . . Consistent with this authority, we conclude that ineffective assistance of counsel is an objective factor external to the petitioner that may constitute good cause to excuse the late filing of a habeas petition under the totality of the circumstances pursuant to § 52-470 (c) and (e). . . . *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 347–48." (Emphasis in original; footnotes omitted; internal quotation marks omitted.) *Hankerson* v. *Commissioner of Correction*, supra, 223 Conn. App. 567–69.

In *Hankerson*, the habeas court "expressly relied on *Kelsey* in concluding that, even if the petitioner's testimony, which indicated that he was not properly advised by [prior habeas counsel] of the deadline for filing a new

habeas petition, were accurate, [prior habeas counsel's] failure to advise the petitioner would not be an external factor that constitutes good cause." Id., 569. Although this case is distinguishable from *Hankerson* in that the habeas court in this case did not expressly reject the petitioner's allegation that Duguay's alleged ineffective assistance in not advising him of the deadline for filing a new petition caused the delay, it is similar in that the habeas court did not consider the alleged ineffective assistance of counsel as an external factor that caused the delay in filing the untimely petition. Thus, in the present case, like in *Hankerson*, "the habeas court did not have the benefit of our Supreme Court's clarification of *Kelsey* in *Rose* regarding 'the fundamental distinction between internal and external factors that cause or contribute to a petitioner's failure to comply with a procedural rule.' [*Rose* v. *Commissioner of Correction*, supra, 348 Conn.] 347. The habeas court therefore did not apply the correct legal standard when deciding whether the petitioner had demonstrated good cause for the late filing of his petition." *Hankerson* v. *Commissioner of Correction*, supra, 223 Conn. App. 569. Accordingly, also as in *Hankerson*, the petitioner in this case is entitled to a new hearing at which the court applies the correct legal standard set forth by our Supreme Court.

The judgment is reversed and the case is remanded for a new hearing and good cause determination under § 52-470 (c) and (e).

In this opinion the other judges concurred.